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Supreme Court of the United States

OCTOBER TERM, 1962

No. 217

JOSEPHINE GOSS, ET AL., PETITIONERS,

vs.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

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[fol. A] [File endorsement omitted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14,425

JOSEPHINE Goss and THOMAS A. Goss, infants by RALPH Goss, their father and next friend, [et al.], Appellants,

—versus—

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, a body corporate or continuous legal entity, c/o DR. JOHN H. BURKHARDT, President; [et al.], Appellees.

Appeal From the United States District Court for the Eastern District of Tennessee, Northern Division.

Appendix to Appellants' Brief—Filed February 28, 1961

[fol. 1]

IN UNITED STATES DISTRICT COURT

Jury demand date:

Civil Docket 3984

JOSEPHINE GOSS and THOMAS A. GOSS, b.n.f. father, [et al.], Plaintiffs,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, [et al.], Defendants.

RELEVANT DOCKET ENTRIES*

Date 1960	*Proceedings USM No. 4284*	*Date Order Judgment No.*
Dec. 11	Complaint filed.	
Dec. 11	Motion for Temporary Restraining Order, filed.	
Dec. 11	Motion for Preliminary Injunction, filed.	
Dec. 18	Order allowing defendant 31 days from Jan. 8, 1960 within which to plead or answer, and further order that defendants appear on Feb. 8, 1960 and show cause why the temporary restraining order and/or preliminary injunction should not issue, or as soon thereafter as there is an available date, entered in Civil Order Book 18, page 33, and filed.	

[fol. 2]

Feb. 8	Answer, filed. Copy served by attorney.	
Feb. 8	Hearing on motion for a restraining order and/or preliminary injunction continued until April 8, 1960, at which time Board of Education is expected to file a plan of integration;	

* Entries not relevant to this appeal have not been printed.

Date 1960	Proceedings USM No. 4284	Date Order Judgment No.
	plaintiffs' allowed 10 days within which to file objections, to which action of the Court the plaintiffs allowed 10 days within which to file 18, page 184, and filed. Copies mailed to attorneys by Clerk.	
Apr. 8	Plan for the desegregation of the Schools of the City of Knoxville, and a certified copy of the adopting resolution attached, filed. Copy served by attorney.	
April 18	Specification of Objections to Plan filed by Knoxville Board of Education filed. Copy served by attorney.	
Aug. 8	Order of hearing by the Court on the Objections of plaintiffs to the Plan of desegregation of the schools of the City of Knoxville, evidence heard, and Court adjourned to 9 A.M., Tuesday, August 9, 1960, entered in Civil Order Book 19, page 252.	
Aug. 9	Case came on to be further heard by the Court, evidence heard, and Court adjourned to 9 A.M., Wednesday, August 10, 1960, entered in Civil Order Book 19, page 280.	
[fol. 3]		
Aug. 10	Case came on to be further heard by the Court, evidence heard, and Court adjourned to 9 A.M., Thursday, August 11, 1960, entered in Civil Order Book 19, page 287.	
Aug. 11	Case came on to be further heard by the Court, remainder of evidence heard, argument of Counsel, and case taken under advisement, entered in Civil Order Book 19, page 291.	
Aug. 19	Memorandum Opinion of Robert L. Taylor, D.J. approving plan nine with one reservation, order to be presented in accordance with views, filed. Copies mailed to attorneys by Clerk.	

Date 1960	Proceedings USM No. 4284	Date Order Judgment No.
Aug. 26	Judgment that the plan of the Board of Education of the City of Knoxville is approved with the single exception that the defendants are directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time; the defendant, Board of Education of the City of Knoxville is ordered to put said Plan as approved by this Court into effect in accordance with the tenor thereof; the motion for preliminary injunction is denied; the jurisdiction of the action is retained during the period of transition; to which actions of the Court the plaintiffs except, entered in Civil Order Book 19, page 339, and filed.	
[fol. 4]		
Sept. 2	Motion for a new trial, filed. Copy served by attorney.	
Sept. 6	Order denying plaintiffs motion for a new trial and for appropriate relief from the operation of the judgment entered by the Court in this cause on August 26, 1960, entered in Civil Order Book 19, page 377, and filed.	
Sept. 23	Notice of Appeal, filed. Copy mailed attorney for defendant by Clerk.	
Oct. 19	Order extending time for filing record and docketing appeal, entered in Civil Order Book 20, page 2, and filed. (90 days from Notice of Appeal) Copies mailed to Attorneys by Clerk.	
Nov. 28	Original and Clerk's Copy of Court Reporter's Transcript of testimony, Vol. 1, 2, & 3 filed.	
Dec. 14	Original record on appeal mailed to U. S. Court of Appeals, Cincinnati, Ohio. (Exhibits retained in this office)	

[fol. 5]

IN UNITED STATES DISTRICT COURT

Civil Action No. 3984

[Title omitted]

COMPLAINT—Filed December 11, 1959

1. (a) The Jurisdiction of this Court is invoked under Title 28, United States Code, section 1331. This action arises under the Fourteenth Amendment of the Constitution of the United States, section 1, and the Act of May 31, 1870, Chapter 14, section 16, 16 Stat. 144 (Title 42, United States Code, section 1981), as hereinafter more fully appears.

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Ten Thousand ($10,000.00) Dollars.

(b) The Jurisdiction of this Court is also invoked under Title 28, United States Code, section 1343. This action is [fol. 6] authorized by the Act of April 20, 1871, Chapter 22, section 1, 17 Stat. 13 (Title 42, United States Code, section 1983), to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, sec. 1, and by the Act of May 31, 1870, Chapter 14, section 16, 16 Stat. 144 (Title 42, United States Code, section 1981), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, as hereinafter more fully appears.

2. This action is a proceeding under Title 28, United States Code, sections 2201 and 2202, for a judgment declaring the rights and other legal relations of plaintiffs and other persons, similarly situated, eligible to attend elementary and secondary schools owned, maintained and operated by the City of Knoxville, Knox County, Tennessee and demanding an injunction, for the purpose of determin-

ing and redressing questions and matters of actual controversy between the parties, to wit:

(a) Whether the custom, policy, practice, or usage of defendants in excluding plaintiffs and other persons, similarly situated, from elementary and secondary schools owned, maintained and operated by the City of Knoxville, Knox County, Tennessee, solely because of their race or color, pursuant to Sections 49-3701, 49-3702 and 49-3703, Tennessee Code, 1955, and that portion of Section 12 of Article 11 of the Tennessee Constitution which makes it unlawful for white and colored persons to attend the same school, and pursuant to any other law, custom, policy, [fol. 7] practice or usage violates the Fourteenth Amendment to the Constitution of the United States.

3. Plaintiffs bring this action pursuant to Rule 23(a)(3) of the Federal Rules of Civil Procedure for themselves and on behalf of all persons similarly situated, who are so numerous as to make it impracticable to bring them all before the Court and who seek a common relief based upon common questions of law and fact.

4. Plaintiffs are Negroes and are citizens of the United States, State of Tennessee, and are residents of and domiciled in the City of Knoxville, Knox County, Eastern Division of the State of Tennessee. All of the infant plaintiffs satisfy all requirements for admission to the public elementary and secondary schools maintained and operated by the defendant Board of Education of the City of Knoxville, Tennessee in and for said City of Knoxville, Knox County, Tennessee. Adult plaintiffs, not applicants, are either parents or guardians of the infant plaintiffs who are applicants.

5. (a) The defendant, Board of Education of the City of Knoxville, Tennessee, is composed of the following board members, the defendants, Dr. John H. Burkhart, Robert B. Ray, Edward C. Woods, Charles R. Moffett and Mrs. Gilmer H. Keith, who acting together as such board members constitute the Board of Education of the City of Knoxville, Tennessee and who as such are hereinafter referred to as defendant Board of Education.

(b) Said defendant Board of Education exists pursuant to the Constitution and laws of the State of Tennessee as an administrative department or agency of the State of Tennessee, discharging governmental functions, and is by [fol. 8] law a body corporate or a continuous body or entity, and is being sued herein as such corporate or continuous body or entity.

(c) All of said defendants, above named as board members of defendant Board of Education, are citizens and residents of the State of Tennessee, and are being sued herein in their official capacities as such board members, and are also being sued herein as individuals.

(d) Defendant Thomas N. Johnston is Superintendent of Schools of the City of Knoxville, Knox County, Tennessee and holds office pursuant to the Constitution and laws of the State of Tennessee as an administrative officer of the free public school system of Tennessee.

(e) Defendant L. Gale Gardner is principal of East High School; defendant Buford A. Bible is Assistant and Acting Principal of East High School; defendant William M. Davis is principal of Fulton High School; defendant Robert H. Cardwell is principal of Park Junior High School; and defendant Donald E. Blackstock is or was principal of Mountain View Elementary School; all of said schools, being public schools maintained and operated by defendant Board of Education in and for the City of Knoxville, Knox County, Tennessee.

(f) Defendant R. Frank Marable is Supervisor of the Child Personnel Department of the Knoxville City Schools and as such is an officer of the Knoxville Public School System and or agent of the defendant Board of Education and is charged with the duty of the supervision of child personnel matters in said School System, including the reception and disposition of applications by school children and or their parents for transfers of said children between schools in said School System.

[fol. 9] (g) Defendants Thomas N. Johnston, R. Frank Marable, Buford A. Bible, L. Gale Gardner, Robert H.

Cardwell, Donald E. Blackstock, and William M. Davis are citizens and residents of the State of Tennessee, and are made defendants herein and sued, in their official capacities as stated hereinabove, and are also being sued herein as individuals.

6. The State of Tennessee has declared public education a State function. The Constitution of Tennessee, Article 11, Section 12, provides:

> "Knowledge, learning and virtue, being essential to the preservation of republican institution, and the difussion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government to cherish literature and science."

Pursuant to this mandate the Legislature of Tennessee has established a uniform system of free public education in the State of Tennessee according to a plan set out in the Tennessee Code, 1955, Sections 49-101 through 49-3806, and supplements and amendments thereto. The establishment, maintenance and administration of the public school system of Tennessee is vested in a Commissioner of Education, a State Board of Education, County and City Superintendents of Public Schools, and County and City Boards of Education.

7. The public schools of the City of Knoxville, Knox County, Tennessee are under the control and supervision of defendant Board of Education and defendant Thomas [fol. 10] N. Johnston, acting as an administrative department, division, or agency, and as an agent of the State of Tennessee. Said Board of Education has full power and control of all matters pertaining to the conduct of public schools within said City, and is vested with authority to exercise such other powers and perform such other duties with respect thereto as may be imposed upon them by law or ordinance by virtue of the legislative acts of the State of Tennessee. Said Board of Education is under a duty to en-

force the school laws of the State of Tennessee; to maintain an efficient system of public schools in the City of Knoxville, Knox County, Tennessee; to determine the studies to be pursued, the methods of teaching, and to establish such schools as may be necessary to the completeness and efficiency of the school system. Defendant, Thomas N. Johnston, as Superintendent, has the immediate control of the operation of public schools of said City and is the administrative agent of the defendant Board of Education.

8. (a) Defendant Board of Education maintains and operates in and for the said City of Knoxville a number of public elementary and secondary schools, including those designated as Mountain View Elementary, Park Junior High, East High and Fulton High Schools, exclusively for the education, convenience and use of white school children residing in the City of Knoxville. All of these schools afford adequate facilities to provide elementary and secondary instruction on a modern basis by grades. These schools, except Fulton High School, are readily accessible to, and are used by white school children residing in the areas proximately surrounding the respective schools; but the facilities offered by these schools are denied by defendants to the infant plaintiffs and other Negro children, [fol. 11] similarly situated, who reside in the areas proximately surrounding said schools, solely because of their race or color.

(b) Fulton High School affords adequate facilities to provide technical and vocational instruction on a modern basis by grades. Fulton High School is used by white children residing in the City of Knoxville, Tennessee who desire said technical and vocational instruction irrespective of their place of residence in the City; but the facilities afforded by Fulton High School are denied by defendants to infant plaintiffs who desire said instruction, and other Negro children, similarly situated, residing in the City of Knoxville, Tennessee irrespective of their place of residence in the City, solely on account of their race or color.

9. (a) At the beginning of the Fall Term or Semester, September 2, 1959, infant plaintiffs, Thomas L. Moore, Jr.,

Albert Winton, Jr. and Dianne Ward, presented themselves and made proper and timely application for admission to Mountain View Elementary School; infant plaintiffs, Josephine Goss, Phyllis Roberts, Elizabeth Pearl Barber, Theotis Robinson, Jr., Sharon Smith, Annie Brown and Ivan Maurice Blake, presented themselves and made proper and timely application for admission to East High School, and infant plaintiffs, Herbert Thompson and Eddie Riddle, presented themselves and made proper and timely application to Fulton High School; but all of said plaintiffs were refused admission by defendant Donald E. Blackstock, Principal of Mountain View Elementary School; defendant Buford A. Bible, Acting and Assistant Principal of East High School; and defendant William M. Davis, Principal of Fulton High School, respectively, to said respective schools, solely on account of plaintiffs' race or color. On the same day September 2, 1959, all of these applicants pre-
[fol. 12] sented themselves to the defendant R. Frank Marable, Supervisor of the Child Personnel Department, and the defendant Thomas N. Johnston, Superintendent of City Schools, and appealed from the action of the defendant Donald E. Blackstock, Principal of Mountain View Elementary School; the defendant Buford A. Bible, Assistant and Acting Principal of East High School and the defendant William M. Davis, Principal of Fulton High School, respectively, in denying and refusing the admission of said infant children to said schools solely because of their race or color; and thereupon, said infant plaintiffs, Thomas L. Moore, Jr., Albert Winton, Jr. and Dianne Ward, made application to said defendants, R. Frank Marable, Supervisor of Child Personnel Department and Thomas N. Johnston, Superintendent of City Schools for transfer from Eastport Elmentary School, a school designated by defendants exclusively for Negroes, to said Mountain View School; and said infant plaintiffs, Josephine Goss, Phyllis Roberts, Elizabeth Pearl Barber, Theotis Robinson, Jr., Sharon Smith, Annie Brown and Ivan Maurice Blake, made application to said defendant officials for transfer from Austin High School, a school designated by defendants exclusively for Negroes, to said East High School on the ground that said Mountain View Elementary School and

said East High School, respectively, were nearer their place of residence than the Eastport Elementary School and Austin High School, respectively. The aforesaid infant plaintiffs reside in the areas served by said respective schools to which they made application, and if they were white children, they would have been transferred and admitted to said schools but all ten of said plaintiffs were refused admission by said defendants to said respective schools, solely on account of their race or color. Defendants require Negro applicants to attend schools designated [fol. 13] exclusively for Negro children, without regard to the proximity of the school.

(b) The said infant plaintiffs, Herbert Thompson and Eddie Riddle, made application to said defendant officials, R. Frank Marable, Supervisor of the Child Personnel Department and Thomas N. Johnston, Superintendent of City Schools, for transfer from Austin High School, a school designated by defendants exclusively for Negroes, to Fulton High School on the ground that they desired to take certain technical and vocational courses at Fulton High School which school afforded adequate facilities for said technical and vocational instruction on a modern basis to the pupils of the City of Knoxville irrespective of their place of residence, and if they were white children they would have been transferred and admitted to said school, but said two infant plaintiffs were refused admission by said defendant officials to said Fulton High School, solely on account of their race or color.

(c) On the following day, September 3, 1959, the infant plaintiff, Donna Graves, presented herself and made proper and timely application for admission to said East High School on the ground that said East High School was nearer her place of residence than the Austin High School. Said Plaintiff resides in the area served by East High School to which she made application and if she were a white child she would have been admitted to said school, but said Plaintiff was refused admission to said East High School by said defendant Buford A. Bible, Assistant and Acting Principal of East High School, solely on account of her race or color. On the same day, September 3, 1959, the said ap-

plicant, Donna Graves, presented herself to the defendant, R. Frank Marable, Supervisor of the Child Personnel De-
[fol. 14] partment and appealed from the action of the said defendant Buford A. Bible, Assistant and Acting Principal of East High School in denying and refusing the admission of said child to said school solely because of her race or color; and thereupon, she made application for transfer from said Austin High School to said East High School on the ground that said East High School is nearer her place of residence than said Austin High School. Said infant plaintiff resides in an area served by said East High School to which she made application and if she were a white child she would have been transferred and admitted to East High School but said plaintiff was refused admission by said defendant F. Frank Farable to said East High School solely on account of race or color. Said plaintiff made several attempts to see said defendant Thomas N. Johnston, Superintendent of City Schools, but without success.

(d) The plaintiff, Ralph Goss, who is father and next friend of the infant plaintiff, Thomas A. Goss, presented himself on said September 2, 1959 to said defendant R. Frank Marable, Supervisor of the Child Personnel Department and then to defendant Thomas N. Johnston, Superintendent of City Schools on behalf of his said son, who was not present, for admission to Park Junior High School; and thereupon requested a transfer for his said son and infant plaintiff from Vine Junior High School, a school designated by defendants exclusively for Negroes, to said Park Junior High School on the ground that said Park Junior High School is nearer his place of residence than the said Vine Junior High School. Said infant plaintiff is required by defendants to attend said Vine Junior High School notwithstanding said Park Junior High School is nearer his place of residence than said Vine Junior High School. Said infant plaintiff resides in an area served by
[fol. 15] said Park Junior High School to which he made application as aforesaid and if he were a white child, he would have been admitted as aforesaid but said infant plaintiff, through his father and next friend, was refused admission by said defendants to said Park Junior High School, solely on account of said plaintiff's race or color.

(e) The infant plaintiffs, Regena Arnett, Michael Arnett and Charles Edmond McAfee, through their respective plaintiff parents and next friends, Mrs. Carolyn Arnett and Reverend Edmond McAfee, are applicants for admission to said Mountain View Elementary School. Although neither said infant plaintiffs nor their said plaintiff parents and next friends presented themselves to said defendant officials, the said adult plaintiffs did, with other parents, petition the defendant Board and Superintendent to desegregate the public schools of the City of Knoxville, Tennessee this year, beginning the fall term of 1959. Said infant plaintiffs are required to attend said Eastport Elementary School, a school designated by defendants exclusively for Negroes, notwithstanding the Mountain View Elementary School is nearer their place of residence than the said Eastport Elementary School. Said infant plaintiffs reside in the area served by said Mountain View Elementary School and would have been admitted there if they were white children. The infant plaintiffs Michael Arnett and Charles Edmond McAfee are attending school for the first time in their lives, being now enrolled in the first grade. These aforesaid infant plaintiffs are being refused admission to said Mountain View Elementary School solely on account of their race or color on the basis of the aforesaid petition by said Plaintiff and other parents to desegregate the Public Schools of Knoxville being denied by defendant Board and on the basis of the Board's formal action [fol. 16] not to desegregate the Public Schools of Knoxville this school year, as more fully hereinafter set forth.

(f) On November 4, 1959 the said Mountain View School was closed by defendant Board of Education and the white children attending school there were transferred to another school also designated by defendants for the exclusive use of white school children. Plaintiffs are informed and believe, and therefore aver upon information and belief, that defendants closed the said Mountain View School for the purpose and with the intention of reopening and designating the same at a subsequent date as a segregated school for the exclusive use of Negro school children.

(g) A committee of five of the adult plaintiffs, to-wit: Ralph Goss, B. A. Ward, Tommy Moore, Theotis Robinzon, Sr. and Clyde Thompson, representing all of the infant and adult plaintiffs, and on behalf of other Negro parents and children of school age and similarly situated, filed a formal Request and Appeal in writing with defendant Board of Education at its regular meeting on September 14, 1959 and which, inter alia, was an appeal to the defendant Board of Education from the action of the aforesaid defendant principals, defendant Supervisor of Child Personnel Department and the defendant Superintendent of City Schools in denying and refusing the admission and transfer of said infant plaintiffs to the aforesaid elementary and secondary schools of the City of Knoxville, Tennessee, solely on account of their race or color, and they further requested that said Negro children be enrolled now in the schools to which they applied as aforesaid.

The said appeal and request was denied by the defendant Board of Education—it took no action thereon and it has continued to maintain and enforce its previous decision [fol. 17] to continue pursuing and enforcing its policy of compulsory racial segregation in the public schools of Knoxville.

10. The defendants rely on the following provisions of the Tennessee Constitution and Statutes, which read as follows:

Constitution of 1870, Art. 11, Sec. 12:

"... No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school...."

Tennessee Code, 1955, Sections:

"49-3701. Interracial Schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. (Acts 1901, ch. 7, sec. 1; Shan., sec 6888a37; Code 1932, sec 11395.)

"49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement. (Acts 1901 ch. 7, sec 2; Shan., sec 6888a38; Code 1932, sec 11396.)

"49-3703. Penalty for violations.—Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined [fol. 18] for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. (Acts 1901, ch. 7, sec 3; Shan., sec 6888a39; mod. Code 1932, sec 11397.)

11. The defendant Board of Education has maintained and operated, and continues to maintain and operate racially segregated elementary and secondary schools for the use of white and Negro children and to enforce a policy and practice of compulsory racial segregation in the City Schools of Knoxville as averred hereinabove. On a number of occasions, beginning with the year of 1954, petitions were presented to the defendant Board of Education by Negro parents of school age children residing in Knoxville, Tennessee, requesting defendants to eliminate the unconstitutional racial segregation here complained of in the public City schools of said City. Said defendant has failed and refused to grant said petitions.

On July 12, 1954 at a regular meeting of defendant Board, a number of parents of Negro children of school age and citizens of the City of Knoxville, Tennessee personally appeared before the defendant Board in support of a petition which previously had been filed with said defendant Board to take immediate action towards desegregating the public schools of the City of Knoxville in accordance with the holding of the Supreme Court of the United States that racial segregation in public education is unconstitu-

tional and void as being in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; and they also requested a meeting with the Board to discuss the matter, but said petition and request were refused. Seventeen Negro parents of children of school age on or about July 8, 1955 and Forty Negro [fol. 19] parents of children of school age on Aug. 13, 1955 on behalf of themselves and on behalf of other Negro parents school children similarly situated petitioned the Board of Education of the City of Knoxville to abolish racial segregation in the public schools of Knoxville and to work out a plan for desegregation in the public schools but not later than September 1955 and that desegregation be completed by not later than the school term beginning September 1956. Said defendant failed and refused to grant said petitions.

On August 17, 1955, the defendant Board issued a formal Statement of Policy declaring that it would act in good faith and would proceed to make a reasonable start in desegregating the public schools and that it had instructed the defendant Superintendent and his Staff to develop a specific plan of action leading to gradual integration of Knoxville Public Schools, but on May 14, 1956 at a regular Board meeting it was announced that the Board had decided to delay indefinitely the formulation and inauguration of a plan of desegregation of our public schools.

On June 7, 1956 the defendant Board was petitioned by the said Negro parents to rescind its said decision to delay indefinitely desegregation of the public schools but said petition was ignored by defendant Board.

Again, on June 11, 1956 at a regular Board meeting a large number of Negro parents of children of school age and other citizens personally appeared before the defendant Board of Education and petitioned said Board to reconsider its immediate previous action or decision, and proceed to desegregate the public schools, but the said Board upon motion duly made and seconded voted unanimously that "we answer their petition with the word 'No'".

The Board further emphasized its decision not to desegregate the public schools and its continued policy and [fol. 20] practice of compulsory racial segregation; when at the beginning of the school term on September 4, 1956

it denied Negro pupils admission to certain schools solely on account of race or color, and subsequently resisted an action filed on January 7, 1957 in the District Court of the United States For The Eastern District of Tennessee, Northern Division, by said children and their parents seeking declaratory relief and admission to the public schools of Knoxville on a racially unsegregated basis and without discrimination on account of race or color. On June 1, 1959 said action was dismissed against three of the members of the defendant Board on a procedural question.

Twenty Negro parents of children of school age, nine of whom are adult plaintiffs, on or about July 9, 1959 petitioned the defendant Board to consider on or prior to its regular meeting on July 13, 1959 the admission of their children this fall (1959) to the public schools of the City of Knoxville, Tennessee, for which said children are qualified, on a racially unsegregated basis and without discrimination on account of race or color. They further requested said Board to eliminate racial segregation in the public schools of Knoxville, that the Board work out a plan for desegregation as soon as possible, and that concrete steps towards desegregation be put into effect the next school term. Other citizens of Knoxville personally appeared with said petitioners before the Board at its said regular meeting and joined in the aforesaid request of Petitioners. The defendant Board failed and refused to take any action on said petition.

Again, at the regular meeting of the defendant Board on August 10, 1959, Negro parents of children of school age and other citizens requested a decision as to desegregating the public schools the next school term (Fall of 1959). The [fol. 21] members of the Board decided to discuss the matter in Executive session, which they did at that time. Shortly thereafter, it was announced by defendant Board in open meeting on said August 10, 1959 that the formal motion voted by the Board states that it "publicly announces that it does not intend to integrate the schools at this time but will continue to study the problem".

Again, on September 14, 1959, being after the infant plaintiffs were refused admission to certain schools because

of their race or color as more particularly averred hereinabove, a group of parents of children of school age and other citizens personally appeared before the Board and with the aforesaid Plaintiffs joined in an appeal to the defendant Board to admit the Negro children now to the schools for which they recently applied and were refused by said defendants on account of race or color; and they further requested the Board to rescind its decision not to desegregate the schools this year; and they further requested the Board to desegregate the schools and adopt a plan for desegregation and elimination of racial discrimination this school year. Defendant Board refused to grant the Appeal and Request, or to take any action thereon.

The defendant, Board of Education, has had two meetings since the said September 14, 1959 meeting, to-wit a called meeting on October 5, 1959 and a regular meeting on November 9, 1959. No report has been made of the defendant Board of Education taking any action to admit said plaintiffs to the respective schools for which they applied or to eliminate racial segregation in the public schools of Knoxville. The said defendant Board has maintained and operated, and continues to maintain and operate racially segregated public elementary and secondary schools for the use of white and Negro children in the City of Knox-
[fol. 22] ville, and to enforce its declared policy and practice of compulsory racial segregation in the public schools of said City.

12. The infant plaintiffs and all other persons, similarly situated, in the City of Knoxville, Knox County, Tennessee, are thereby deprived of their rights guaranteed by the Constitution and laws of the United States.

Plaintiffs aver that the said constitutional and statutory provisions and all other laws, customs, policies, practices and usages of the State of Tennessee requiring or permitting segregation of the races in public education fall within the prohibited group which the Supreme Court of the United States holds must yield to the Fourteenth Amendment of the Constitution of the United States; and in addition, the Supreme Court of Tennessee has held that said segregation laws of the State of Tennessee violate the

Fourteenth Amendment of the Constitution of the United States, and are of no force and effect.

Plaintiffs therefore aver that the said custom, policy, practice or usage of defendants in excluding plaintiffs and other persons, similarly situated, from elementary and secondary schools, owned, maintained and operated by the City of Knoxville, solely because of their race or color, pursuant to said constitutional and statutory provisions and any other law, custom, policy, practice or usage of the State of Tennessee requiring or permitting segregation of the Negro and white races in public education, violates the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void and affords defendants no legal excuse to deprive plaintiffs of their rights herein prayed.

[fol. 23] 13. Plaintiffs and those similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of other than this suit for a declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to the plaintiffs and those similarly situated, but to defendants as governmental agencies.

Plainiffs further aver that for over five (5) years the defendants and/or their predecessors have had notice that the policy and practice of compulsory racial segregation which they are enforcing is unconstitutional and void. Many of the infant plaintiffs were small children when defendants first received that notice. These plaintiffs have been deprived of their right to a racially unsegregated and nondiscriminatory education in the public schools for this long period of time, and each additional day or month of such deprivation brings them closer and closer to complete exclusion from and loss of that constitutional right, to their

immediate and lasting harm and damage. In addition, at least two of the infant plaintiffs were entering the first grade this year. These infants had not been subjected to or indoctrinated with the racial prejudices, segregation and discrimination in public education enforced by defendants. Whether defendants require these first graders to continue in the racially segregated school in which defendants compelled them to enroll in September, 1959, or whether defen- [fol. 24] dants re-open Mountain View Elementary School as one segregated for exclusive attendance by Negro children and then transfer said first grade plaintiffs to that school, these infant plaintiffs are in either case being subjected for the first time to the inherent evil, inequality and humiliation of the unconstitutional compulsory racial segregation, to their immediate and lasting harm and damage.

Plaintiffs are advised that the next school term or semester in the City Schools of Knoxville begins on January 1960, so that unless the defendants are immediately restrained from pursuing and enforcing their unlawful action in refusing to admit the individual named infant plaintiffs, said plaintiffs will suffer the immediate and irreparable injuries and damages as set out above.

14. There is between the parties an actual controversy as hereinbefore set forth.

Wherefore Plaintiffs respectfully pray that:

The Court issue forthwith a temporary restraining order against the defendants, immediately restraining and enjoining them and each of them, their officers, attorneys, agents, employees, successors in office, and all persons in active concert and participation with them from refusing to admit or transfer the infant plaintiffs, Thomas L. Moore, Jr., Albert Winton, Jr., Dianne Ward, Regena Arnett, Michael Arnett and Charles Edmond McAfee, to the Mountain View Elementary School, the infant plaintiff, Thomas A. Goss, to the Park Junior High School, the infant plaintiffs, Josephine Goss, Phyllis Roberts, Elizabeth Pearl Barber, Theotis Robinson, Jr., Sharon Smith, Annie Brown, Ivan Maurice Blake and Donna Graves, to East High

School, and the infant plaintiffs, Herbert Thompson and [fol. 25] Eddie Riddle, to Fulton High School, or any other public school maintained and/or operated by them in and for the City of Knoxville, Knox County, Tennessee, on account of plaintiffs race or color, pending further orders of the Court.

The Court issue a preliminary injunction restraining and enjoining the defendants and each of them, their officers, attorneys, agents, employees, successors in office, and all persons in active concert and participation with them, as of the first day of the next school term or semester beginning in January, 1960, from refusing to admit or transfer the infant plaintiffs, Thomas L. Moore, Jr., Albert Winton, Jr., Dianne Ward, Regena Arnett, Michael Arnett and Charles Edmond McAfee, to the Mountain View Elementary School, the infant plaintiff, Thomas A. Goss, to the Park Junior High School, the infant plaintiffs, Josephine Goss, Phyllis Roberts, Elizabeth Pearl Barber, Theotis Robinson, Jr., Sharon Smith, Annie Brown, Ivan Maurice Blake and Donna Graves, to East High School and the infant plaintiffs, Herbert Thompson and Eddie Riddle, to Fulton High School, or any other public school maintained and/or operated by them in and for the City of Knoxville, Knox County, Tennessee, because of their race or color, pending further orders of the Court.

The Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter herein controversy in order that such declaration shall have the force and effect of a final judgment or decree.

The Court enter a judgment or decree declaring that the custom, policy, practice or usage of defendants in excluding plaintiffs and other persons, similarly situated, from Mountain View Elementary School, Park Junior High School, East High School, Fulton High School, or any other public elementary or secondary schools maintained and operated [fol. 26] by defendant Board of Education in and for the City of Knoxville, Knox County, Tennessee, solely because of race, pursuant to the above quoted portion of Article 11, Section 12 of the Constitution of Tennessee, Section 49-3701, 49-3702, 49-3703 of the Tennessee Code, 1955, and any other law, custom, policy, practice and usage,

violates the Fourteenth Amendment of the United States Constitution, and is therefore unconstitutional and void.

The Court issue a permanent injunction forever restraining and enjoining defendants, and each of them, their officers, attorneys, agents, employees, successors in office, and all persons in active concert and participation with them, from enforcing and pursuing the policy, practice, custom, and usage of requiring or permitting racial segregation in the operation of the public schools of the City of Knoxville, and from engaging in any and all action which limits or affects admission to, attendance in, or education of the infant plaintiffs, or any other Negro children similarly situated, in schools under defendants' jurisdiction, on the basis of race or color.

That in addition to the immediate and preliminary relief prayed hereinabove in behalf of the named infant plaintiffs individually, the Court also issue expeditiously an order in behalf of the plaintiffs and all other persons similarly situated, requiring the defendants to present to this Court, a complete plan, adopted by them, which is designed to bring about good faith compliance with the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A. L. R. (ad) 1180, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, at the earliest practicable date throughout the Public School System of the City of Knoxville, Knox County, Tennessee; and which shall provide for a [fol. 27] prompt and reasonable start towards desegregation of the public schools of said City and a systematic and effective method for achieving such desegregation with all deliberate speed.

Plaintiffs further pray that the Court will allow them their costs and such further, other or additional relief as may appear to the Court to be equitable and just.

Carl A. Cowan, 101½ W. Vine Avenue, Knoxville 2, Tennessee.
Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee.
Jack Greenberg and Thurgood Marshall, 10 Columbus Circle, New York 19, New York.

Attorneys for Plaintiffs.

[fol. 28]

IN UNITED STATES DISTRICT COURT

ANSWER OF THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, ET AL.—Filed February 8, 1960

The defendants for answer to the complaint filed against them in the above-styled cause say:

1. Defendants admit the averments of Section 1 of the complaint.

2. Defendants deny the averments of fact of Section 2 of the complaint. It is not admitted that the applications made on behalf of the plaintiffs for admission to the various schools were made properly, or that any of the plaintiffs were qualified to be admitted as pupils, and therefore it is denied that there is an actual controversy between the parties.

3. Defendants deny that this action is brought on behalf of all persons similarly situated. The defendants are informed that it is the desire of the large majority of other negro pupils of Knoxville Public Schools, and of their parents and guardians, that this action not be filed and that it now not be prosecuted. It is therefore denied that these plaintiffs will fairly insure the adequate representation of the class.

4. Defendants assume that the plaintiffs are negroes and are citizens of the United States and of the State of Tennessee and are residents of and domiciled in the City of Knoxville, Knox County, Tennessee, and therefore defendants do not deny these averments. Defendants deny that each of the infant plaintiffs satisfied all requirements for admission to a public elementary, or secondary school, as the case may be, maintained and operated by the defendants Board of Education of Knoxville in and for the City of Knoxville. Defendants are not informed as to whether [fol. 29] the adult plaintiffs are parents or guardians of the infant plaintiffs who are applicants, and therefore deny the averment.

5. Defendants admit the averments of Section 5 of the complaint (as subsequently amended to name Roy E. Linville, instead of Edward C. Wood), except that it is denied that the Board of Education is a corporate or a continuous body or entity.

6. Defendants admit the averments of Section 6 of the complaint, but it is noted that Tennessee Statutes referred to in the complaint have been supplemented by various statutes enacted later by the General Assembly of the State of Tennessee.

7. Defendants admit the averments in Section 7 of the complaint.

8. Defendants admit the averments of Section 8 of the complaint except that it is denied that facilities afforded by the schools named are denied by defendants to the infant plaintiffs and other negro children, similarly situated, solely because of their race or color.

9. Defendants do not have sufficient information to enable them to identify the applicants as being the plaintiffs in this case, nor to admit that any of the applicants were qualified, apart from race or color, for admission to the schools, nor to admit that the applications were made either by the minors themselves or by persons authorized to act for them, or were made properly and timely, nor to admit the other averments. Defendants deny all the averments of Section 9 of the complaint.

[fol. 30] 10. Defendants admit the averments of Section 10 of the complaint. Defendants rely upon other statutes and laws.

11. Defendants admit that petitions were presented to the defendant Board of Education some time ago, and assumes that the dates specified and the other details of said petitions are correctly stated in the complaint. Defendants admit that it denied said petitions; admit that a case was filed in this Court on January 7, 1957, seeking substantially the same relief as the present case, and the defendants in that cause resisted the same. Otherwise the averments of the complaint are denied.

12. Defendants deny the averments of Section 12 of the complaint.

13. Defendants deny the averments of Section 13 of the complaint.

14. Defendants deny the averments of Section 14 of the complaint.

15. Defendants aver that for several generations the school system of Knoxville has been planned and operated in conformity with the principle of segregation. This has been required by the Constitution of the State of Tennessee of 1870, and statutes passed thereunder, as well as by the sentiment of the community, and had met with the express approval of the Supreme Court of the United States until its recent reversal of its own holdings. In administering this policy in Knoxville there has been no discrimination against negroes. It is shown that from the very outset of efforts to re-establish educational facilities immediately [fol. 31] after the Civil War, the school authorities of the City of Knoxville have been heedful of the educational needs of negroes, have adhered to the enforcement of the same standards for education for negroes as for whites and have provided buildings, equipment, and teaching which met the same standards in the case of negroes as in the case of white pupils. By way of illustration, in the report of the Chairman of the Board of Education dated August 15, 1874, it is said:

> "All the Schools, white and colored, have been managed exactly alike from the start, save in this; white teachers have taught white schools, and colored teachers colored schools. The same Course of Study in each; and same rules and regulations; the same pay for teachers of the same grade; and the same Board of Examiners for all teachers."

It is shown that the policy thus established soon after the Civil War has been followed ever since except for a short period of time, long since expired, when white teachers were paid slightly more than negro teachers. The same courses, books, facilities and supervision are employed in

negro schools as in the white schools. Non-discriminatory treatment of negroes is shown by the following illustrative figures:

Knoxville Public School System—January 22, 1960

	White	Negro	Total
Number of Students	17,260 (78%)	4,752 (22%)	22,012
Number of Schools	30 (75%)	10 (25%)	40
Number of Teachers	627 (79.37%)	163 (20.63%)	790

[fol. 32]

Average salary, all teachers	$4,447.08
Average salary, men teachers, white	4,462.05
Average salary, men teachers, negro	4,612.91
Average salary, women teachers, white	4,448.44
Average salary, women teachers, negro	4,393.37

Expenditures in building program commenced in 1954, pursuant to plans for expansion originating in 1946—New construction and improvements to date:

For white students	$4,419,889.00	or 60.05%
For negro students	2,940,663.50	or 39.95%
Total	$7,360,552.50	

Since the year 1870 the City of Knoxville has maintained excellent negro schools comparing most favorably with any other negro schools in the whole South. Defendants have discovered, in consequence, that the great majority of negroes in the City do not seek desegregation, and this fact is one of the facts which must be considered.

Negro children have not been any more crowded in their schools than white children in the white schools. There have been crowded conditions in both. A program of building, formed even before the first decision of the Supreme Court of the United States in the Brown case, contemplated sufficient construction to relieve these crowded conditions in both negro and white schools, and this program is now substantially completed.

This defendant Board of Education and its members have not felt that they could join white and negro children in the public school rooms of Knoxville without the compulsion of law. Such joinder is not now sought or desired by the vast majority of both races in this community. Many [fol. 33] who do seek it, or think it proper, do so only because the Supreme Court of the United States has so ordered. But in that very decision there was overturned a vast body of contrary precedent. The decisions of that Court are never unchangeable, and a different membership in the future may order differently. The decision sharply conflicts with the social patterns and ideas that have prevailed without dispute from the time that members of both races first started living together in this community. This custom has been peaceably observed, for the most part, and it is not thought that the change which has been decreed will be followed by any greater tranquility than before.

It is therefore stated to this Court that the said defendants do not for one moment admit to any dereliction of duty on their, or their predecessors' part in not having hastened to obey the Supreme Court's pronouncement. Two duties of these defendants have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a careful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged the responsibilities of their offices in the only way that a proper reconciliation of conflicting allegiances has permitted. The defendants owe no apologies to anyone, and make none.

The defendants are advised that there does not now exist any reasonable support for the proposition that the decision of the Supreme Court will be changed within the foreseeable future. It is the judgment of the defendants that to [fol. 34] struggle against it is only to urge again arguments which will be brushed aside. But, in addition to the reasons above set forth for delaying desegregation, defendants have been of the opinion that the delay until this time has been

well-advised in that it enabled the Board of Education to conduct the schools in an uninterrupted way which might not have been possible otherwise, and also has provided opportunity for the Courts to better define the requisites of acceptable plans.

The defendants feel that in Knoxville there will not be encountered difficulties which elsewhere in the south seem insurmountable. The defendants feel that the desegregation of schools can be accomplished with a minimum of disruption, but only if it is undertaken in a planned, deliberate fashion.

If the Court so orders, the defendant Board of Education will propose a plan of desegregation that will become operative with the least disruption. But the defendant Board of Education and its members also say that they reserve fully every right in this and every other proceeding, present or future, to prove all facts, take all steps, and urge all reasons which, in the light of the present interpretation or further development of the meaning and enforcement of the Constitution of the United States, justify in the opinion of said Board of Education an effort or efforts to effectuate fully the desires of the people of this community in the field of public education.

No emergency exists which compels immediate preferment of the claims of the plaintiffs over the continued orderly teaching and training of the children of Knoxville.

Defendants aver that the spring term of the public schools of the City of Knoxville has already begun, that the schools [fol. 35] will be seriously upset in their orderly operation if a plan of desegregation is made effective at any time other than the beginning of a school term. And that as an administrative matter, and in the balancing of the rights of all other children of the Knoxville schools against the rights of the plaintiffs and those whom they may represent, equity and fairness dictate the postponement of the effective date of any plan of desegregation.

And now, having fully answered, these defendants pray to be hence dismissed.

S. Frank Fowler, Attorney for Defendants.

[fol. 36] IN UNITED STATES DISTRICT COURT

ORDER—February 8, 1960

This cause was heard on February 8, 1960 upon plaintiffs' complaint and prayers for a temporary restraining order, preliminary injunction, for declaration of the rights and legal relations of the parties, for an order declaring unconstitutional and void the alleged practice or custom of defendants' alleged failure or refusal to admit plaintiffs to white schools because of race or color in violation of the Fourteenth Amendment of the Constitution, for a permanent injunction restraining defendants from enforcing the aforementioned alleged practice and custom, and for an order requiring defendants to present to this Court a complete plan designed to bring about a good faith compliance with the decision of the Supreme Court in *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294 at the earliest practical date throughout the public school system of Knoxville which shall provide a prompt and reasonable start of desegregation of City schools and a systematic and effective method for accomplishing such desegregation with all deliberate speed; and, the Court, after examination of the answer of defendants and the supporting brief of plaintiffs and after hearing argument of counsel and after questioning them with respect to the pertinent questions involved in the suit, submitted to counsel for the defendants the specific question when the defendant Members of the Board of Education expected to submit a plan in accordance with the sixth and last prayer of the complaint, to which counsel replied that the Board would like to have until June 15, 1960 to submit such plan. Thereupon, counsel for plaintiffs stated that they felt that a plan should be submitted on or before April 1, 1960. The Court then fixed the date as April 8, 1960.

[fol. 37] Pending the submission of such plan on or before April 8, 1960, the Court withholds any action upon the five remaining prayers of the complaint. Plaintiffs shall have 10 days following the filing of the plan within which to file objections thereto.

The plaintiffs except to the action of the Court in withholding action upon their prayers for a temporary restrain-

ing order and preliminary injunction pending the submission of the plan.

Enter:

Robt. L. Taylor, United States District Judge.

[fol. 38]

IN UNITED STATES DISTRICT COURT

PLAN FILED IN ACCORDANCE WITH PROCEEDINGS OF FEBRUARY 8, 1960.—Filed April 8, 1960

The Defendant Board of Education understood that by reason of the proceedings held in the Federal Court on February 8, 1960, and the order entered pursuant thereto, the Board was under direction from the Court to present a plan for the desegregation of the Schools of the City.

The Defendant Board of Education has adopted a plan for the racial desegregation of the public schools of Knoxville, Tennessee, and a certified copy of the adopting resolution is attached hereto, including the plan itself.

S. Frank Fowler, Attorney for Defendants.

Two copies hereof have been today mailed to counsel for Plaintiffs. April 7, 1960.

S. Frank Fowler, Attorney for Defendants.

KNOXVILLE CITY SCHOOLS
BOARD OF EDUCATION BLDG.
FIFTH AVE. AT CENTRAL
KNOXVILLE 17, TENNESSEE

T. N. JOHNSTON
SUPERINTENDENT

A. C. HUTSON, JR.
BUSINESS MANAGER

TO THE HONORABLE ROBERT L. TAYLOR
JUDGE OF THE U. S. DISTRICT COURT OF KNOXVILLE

On Wednesday, March 30, 1960 at a meeting of the Board of Education duly held, the Superintendent of the Public

[fol. 39] Schools of Knoxville, speaking for himself and the administrative staff, recommended that the Board adopt the following plan of desegregation called "Plan No. 9":

"1. Effective with the beginning of the 1960-61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961-62 school year racial segregation shall be discontinued in Grade Two and thereafter in the next higher Grade at the beginning of each successive year until the Desegregation Plan is effected in all twelve grades.

3. Each student entering a desegregated grade in the Knoxville Public School will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

[fol. 40] 6. The following will be regarded as some of the valid conditions to support requests for transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only;

b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

Said meeting was adjourned to convene again before April 8, 1960 and the adjourned meeting was regularly reconvened on Monday, April 4, 1960 at 7:30 P.M. when the following resolution was moved by Dr. Charles Moffett and seconded by Mr. Roy Linville and adopted:

"I move that the Board follow the recommendation of the Superintendent and submit Plan No. 9 to the Federal Judge on April 8, 1960."

I hereby certify that the foregoing resolution was properly adopted by the Board of Education of Knoxville, Tennessee at a meeting duly held on April 4, 1960.

April 5, 1960

John H. Burkhart, M. D., President.

Roy E. Linville, Secretary.

[fol. 41]

IN UNITED STATES DISTRICT COURT

SPECIFICATION OF OBJECTIONS TO PLAN FILED BY KNOXVILLE BOARD OF EDUCATION—Filed April 18, 1960

The plaintiffs, Josephine Goss, et al., respectfully object to the plan filed in the above entitled cause on or about the 8th day of April, 1960, by the defendant, Knoxville Board of Education and specify as ground of objection the following:

1. That the plan does not provide for elimination of racial segregation of the public schools of Knoxville "with all deliberate speed" as required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. That the plan does not take into account the period of nearly five (5) years which have elapsed during which

the defendant, Knoxville Board of Education, has completely failed and refused to comply with the said requirements of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. That the additional twelve (12) year period provided in said plan is not "necessary in the public interest" and is not "consistent with good faith compliance at the earliest practicable date" in accordance with the said requirement of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. The defendants have not carried their burden of showing any problems related to public school administration arising from:

a. "the physical condition of the school plant";

[fol. 42] b. "the school transportation system";

c. "personnel";

d. "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis";

e. "revision of local laws and regulations which may be necessary in solving the foregoing problems";

as specified by the Supreme Court in Brown v. Board of Education (May 31, 1955) 349 US 294, 75 S Ct 753, 99 L Ed 653, which necessitate the additional time contemplated by their plan for compliance with the constitutional requirement of a racially unsegregated public educational system.

5. That the plan forever deprives the infant plaintiffs and all other Negro children now enrolled in the public schools of Knoxville, of their rights to a racially unsegregated public education, and for this reason violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. That the plan fails to take into account the rights of the infant plaintiffs and other Negro children similarly

situated and forever deprives them of their rights to enroll in and attend Fulton Technical High School and other special vocational schools, summer courses and educational training of a specialized nature as to which enrollment is not based on location of residence.

7. Paragraph six (6) of the plan violates the due process and equal protection clauses of the Fourteenth Amendment [fol. 43] to the Constitution of the United States in that said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operates to perpetuate racial segregation.

Wherefore, the Plaintiffs pray:

1. That the Court hear evidence upon their motions for temporary restraining order and preliminary injunction at an early date and that said restraining order and/or preliminary injunction be granted.

2. That the declaratory and injunctive relief prayed for in their Complaint be granted, said injunctive relief to be effective not later than the beginning of the Fall Semester or Term of the City Schools of Knoxville in September, 1960.

3. That upon the hearing of Plaintiffs' motion for temporary restraining order and preliminary injunction, the Court also hear and determine the questions raised by the proposed Plan filed by the defendant Board of Education of the City of Knoxville, Tennessee and plaintiffs' objections thereto; and that said proposed plan be disapproved as not conforming to the due process and equal protection clauses of the Fourteenth (14th) Amendment to the Constitution of the United States.

[fol. 44]

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed August 4, 1960

In this cause, it is hereby agreed and stipulated by and between the parties as evidenced by the signatures of the respective counsel hereto, that the within may be filed, deemed, and treated as evidence to be used at the trial.

1. Plaintiffs are Negroes and are citizens of the United States, State of Tennessee, and are residents of and domiciled in the City of Knoxville, Knox County, Eastern Division of the State of Tennessee.

2. Adult plaintiffs, not applicants, are either parents or guardian of the infant plaintiffs who are applicants.

3. All infant plaintiffs are presently attending public schools operated by the City of Knoxville, except that the infant plaintiffs, Ivan Maurice Blake, Theotis Robinson, Jr., Eddie Biddle and Herbert Thompson, graduated from Austin High School on May 31, 1960.

4. Defendants include the members of the Board of Education of the City of Knoxville, to-wit: Dr. John Burkhart, Robert B. Ray, Roy E. Linville, Charles R. Moffett and Mrs. Gilmer H. Keith, and also includes the Board of Education of the City of Knoxville as a party, the School Superintendent and the persons who were either actual Principals or acting Principals of East High School, Park Junior High School, Mountain View Elementary School and Fulton High School in Knoxville, Tennessee, and also includes the Supervisor of Child Personnel Department, said defendants being the administrative officers having general supervision and control of the public schools of Knoxville.

5. The defendant Board of Education maintains and operates in and for the said City of Knoxville a number of [fol. 45] public elementary and secondary schools, including those designated as Mountain View Elementary, Park Junior High, East High and Fulton High Schools, exclusively for the education, convenience and use of white school

children residing in the City of Knoxville. All of these schools afford adequate facilities to provide elementary and secondary instruction on a modern basis by grades. These schools, except Fulton High School, are readily accessible to, and are used by white school children residing in the areas proximately surrounding the respective schools; but the facilities offered by these schools are denied by the defendants to the infant plaintiffs and other Negro children, similarly situated, who reside in the areas proximately surrounding said schools, solely because of their race or color. The defendant Board of Education maintains and enforces a policy and practice of compulsory racial segregation throughout the Knoxville School System.

6. Fulton High School, in addition to providing the usual high school courses, affords adequate facilities to provide technical and vocational instruction on a modern basis by grades. Fulton High School is used by white children residing in the City of Knoxville, Tennessee who desire and are qualified to take said technical and vocational instruction irrespective of their place of residence in the City of Knoxville; but the facilities afforded by Fulton High School are denied by defendants to infant plaintiffs who desire said instruction, and other Negro children, similarly situated, residing in the City of Knoxville, Tennessee irrespective of their place of residence in the City of Knoxville, solely on account of their race or color.

7. (a) At the beginning of the Fall Term or Semester, September 2, 1959, infant plaintiffs, Thomas L. Moore, Jr., [fol. 46] Albert Winton, Jr. and Dianne Ward, presented themselves and made proper and timely application for admission to Mountain View Elementary School; infant plaintiffs, Josephine Goss, Phyllis Roberts, Elizabeth Pearl Barber, Theotis Robinson, Jr., Sharon Smith, Annie Brown and Ivan Maurice Blake, presented themselves and made proper and timely application for admission to East High School, and infant plaintiffs, Herbert Thompson and Eddie Riddle, presented themselves and made proper and timely application to Fulton High School; but all of said plaintiffs were refused admission by defendant Donald E. Blackstock,

Principal of Mountain View Elementary School; defendant Buford A. Bible, Acting and Assistant Principal of East High School; and defendant William M. Davis, Principal of Fulton High School, respectively, to said respective schools, solely on account of plaintiffs' race or color.

On the same day, September 2, 1959, all of these applicants presented themselves to the defendant R. Frank Marable, Supervisor of the Child Personnel Department, and the defendant Thomas N. Johnston, Superintendent of City Schools, and appealed from the action of the defendant Donald E. Blackstock, Principal of Mountain View Elementary School, the defendant Buford A. Bible, Assistant and Acting Principal of East High School and the defendant William M. Davis, Principal of Fulton High School, respectively, in denying and refusing the admission of said infant plaintiffs to said schools solely because of their race or color. Thereupon said infant plaintiffs, Thomas L. Moore, Jr., Albert Winton, Jr. and Dianne Ward, made application to said defendants, R. Frank Marable, Supervisor of Child Personnel Department and Thomas N. Johnston, Superintendent of City Schools for transfer from Eastport Elementary School, a school designated by defen- [fol. 47] dants exclusively for Negroes, to said Mountain View Elementary School; and said infant plaintiffs, Josephine Goss, Phyllis Roberts, Elizabeth Pearl Barber, Theotis Robinson, Jr., Sharon Smith, Annie Brown and Ivan Maurice Blake, made application to said defendant officials for transfer from Austin High School, a school designated by defendants exclusively for Negroes to said East High School on the ground that said Mountain View Elementary School and said East High School, respectively, were nearer their place of residence than the Eastport Elementary School and Austin High School, respectively. The aforesaid infant plaintiffs reside in the areas served by said respective schools to which they made application, and if they were white children, they would have been transferred, assigned and admitted to said schools but all ten of said plaintiffs were refused admission to said respective schools by said defendant officials, solely on account of their race or color. The defendants require Negro applicants to attend schools designated exclusively for Negro

children, without regard to the proximity of their residences to the schools designated for white children.

(b) The said infant plaintiffs, Herbert Thompson and Eddie Riddle, made application to said defendant officials, R. Frank Marable, Supervisor of the Child Personnel Department and Thomas N. Johnston, Superintendent of City Schools, for transfer from Austin High School, a school designated by defendants exclusively for Negroes, to Fulton High School on the ground that they desired to take certain technical and vocational courses at Fulton High School which school afforded adequate facilities for said technical and vocational instruction on a modern basis to the pupils of the City of Knoxville irrespective of their place of residence. If they were white children their ap-
[fol. 48] plications would have been received and considered, but the applications of said two infant plaintiffs were refused and they were denied admission by said defendant officials to said Fulton High School, solely on account of their race or color.

(c) On the following day, September 3, 1959, the infant plaintiff, Donna Graves, presented herself and made proper and timely application for admission to said East High School on the ground that said East High School was nearer her place of residence than the Austin High School. Said plaintiff resides in the area served by East High School to which she made application and if she were a white child she would have been admitted to said school, but said plaintiff was refused admission to said East High School by Buford A. Bible, Assistant and Acting Principal of East High School, solely on account of her race or color. On the same day, September 3, 1959, the said applicant, Donna Graves, presented herself to the defendant, R. Frank Marable, Supervisor of the Child Personnel Department and appealed from the action of the said defendant Buford A. Bible, Assistant and Acting Principal of East High School in denying and refusing the admission of said child to said school solely on account of her race or color; and thereupon she made application for transfer from said Austin High School to said East High School on the ground that said

East High School is nearer her place of residence than said Austin High School. Said infant plaintiff resides in the area served by said East High School to which she made application and if she were a white child she would have been transferred, assigned and admitted to East High School but said plaintiff was refused admission by said defendant R. Frank Marable to said East High School solely on account of her race or color.

[fol. 49] (d) The plaintiff, Ralph Goss, who is the father and next friend of the infant plaintiff, Thomas A. Goss, presented himself on said September 2, 1959 to said defendant R. Frank Marable, Supervisor of the Child Personnel Department and then to defendant Thomas N. Johnston, Superintendent of City Schools on behalf of his said son, who was not present, for admission to Park Junior High School; and thereupon requested a transfer for his said son and infant plaintiff from Vine Junior High School, a school designated by defendants exclusively for Negroes, to said Park Junior High School on the ground that said Park Junior High School is nearer his place of residence than the said Vine Junior High School. Said infant plaintiff resides in an area served by said Park Junior High School to which he made application as aforesaid. Said infant plaintiff is required by defendants to attend Vine Junior High School notwithstanding said Park Junior High School is nearer his place of residence than said Vine Junior High School. If he were a white child, he would have been transferred, assigned and admitted to said Park Junior High School, but said infant plaintiff, through his father and next friend, was refused admission by said defendants to said Park Junior High School, solely on account of said plaintiff's race or color.

(e) The infant plaintiffs, Regena Arnett, Michael Arnett and Charles Edmond McAfee, through their respective plaintiff parents and next friends, Mrs. Carolyn Arnett and Reverend Edmond McAfee, are applicants for admission to said Mountain View Elementary School. Although neither said infant plaintiffs nor their said plaintiff parents and next friends presented themselves to said defendant

officials, the said adult plaintiffs, with other parents, petitioned the defendant Board and Superintendent to desegre-
[fol. 50] gate the public schools of the City of Knoxville, Tennessee, beginning the fall term of 1959. Said infant plaintiffs are required to attend Eastport Elementary School, a school designated by defendants exclusively for Negroes, notwithstanding the Mountain View Elementary School is nearer their place of residence than the said Eastport Elementary School. Said infant plaintiffs reside in the area served by said Mountain View Elementary School and would have been admitted if they were white children.

The infant plaintiffs, Michael Arnett and Charles Edmond McAfee, attended school for the first time in their lives, being enrolled in the first grade at the beginning of the fall term, September, 1959. These aforesaid infant plaintiffs were refused admission to said Mountain View Elementary School solely on account of their race or color on the basis of the aforesaid petition by said plaintiffs and other parents to desegregate the Public Schools of Knoxville being denied by defendant Board and on the basis of the Board's formal action on or about August 10, 1959 not to desegregate the public schools of Knoxville the school year beginning the fall of 1959.

(f) All of the aforesaid infant plaintiffs, who presented themselves to the aforesaid defendant officials for admission to the respective schools as aforesaid, were accompanied by adult plaintiffs, or, by adult friends who were acting at the request of certain adult plaintiffs.

(g) All of the infant plaintiffs were in September, 1959, elegible and qualified to attend the public elementary and secondary schools maintained and operated by the defendant Board of Education of the City of Knoxville, Tennessee, and all of the said infant plaintiffs satisfied all requirements for admission to said schools.

[fol. 51] (h) A committee of five adult plaintiffs, to-wit: Ralph Goss, B. A. Ward, Tommy Moore, Theotis Robinson, Sr. and Clyde Thompson, representing all of the infant and adult plaintiffs, and on behalf of other Negro parents and

children of school age and similarly situated, filed a formal Request and Appeal in writing with defendant Board of Education at its regular meeting on September 14, 1959 and which, *inter alia*, was an appeal to the defendant Board of Education from the action of the aforesaid defendant principals, defendant Supervisor of Child Personnel Department and the defendant Superintendent of City Schools in denying and refusing the admission, assignment and transfer of said infant plaintiffs to the aforesaid elementary and secondary schools of the City of Knoxville, Tennessee, solely on account of their race or color, and they further requested that said Negro children be enrolled now in the schools to which they applied as aforesaid; and they further requested the defendant Board to desegregate the public schools and adopt a plan for desegregation and elimination of racial discrimination this school year.

The said appeal and request was denied by the defendant Board of Education in that it took no action thereon.

8. That the defendant Board of Education of the City of Knoxville and other defendants require all white children and colored children to attend racially segregated schools throughout the school system of the City of Knoxville in Knox County of the State of Tennessee. This segregation is required in reliance upon Sections 49-3701, 49-3702 and 49-3703, Tennessee Code, 1955, and that portion of Section 12 of Article 11 of the Tennessee Constitution which makes it unlawful for white and colored persons to attend the same school.

[fol. 52] 9. The school system of Knoxville consists of 40 schools, total enrollment of 22,448 students, of whom 4786 are Negro students and 17,662 are white students, as at the close of school in June, 1960.

10. The Knoxville School System employed a total of 879 Principals and Teachers, of whom 712 are white persons and 167 are Negroes, for the year ending June, 1960.

11. The enrollment in the first grade of Knoxville Public School System for the year ending June, 1960 was approximately 2314 students, and 2500 are anticipated in the first grade for the year beginning September, 1960, of whom

approximately 1900 are anticipated to be white students and 600 Negro students. Teachers employed for the first grade, year 1959-60 of the Knoxville School System numbered 84, of whom 63 were white persons and 21 were Negroes.

12. Insofar as quality of teaching is concerned, the Public Schools of Knoxville operated for Negro students are substantially equal to the Public Schools of Knoxville operated for white students.

13. In the Public Schools of Knoxville there is no difference in the salary schedule of Negro teachers and white teachers.

14. The physical facilities for white and Negro pupils in Knoxville are excellent.

15. On November 4, 1959 the said Mountain View Elementary School was closed by defendant Board of Education and the white children attending school there were transferred to another school also designated by defendants [fol. 53] for the exclusive use of white school children. The defendants plan to reopen and designate said Mountain View Elementary School in September, 1960 as a segregated school for the exclusive use of Negro school children. A number of white children still reside in the area served by said Mountain View Elementary School.

16. On a number of occasions, beginning with the year 1954, petitions were presented to the defendant Board of Education by Negro parents of children of school age and other citizens residing in Knoxville, Tennessee requesting defendants to eliminate and abolish racial segregation in the public City Schools of said City. Said defendant has failed and refused to grant said petitions.

17. On July 12, 1954, Negro parents and other citizens personally appeared before defendant Board in support of a Petition which had previously been filed with the Board to take immediate action towards desegregating the Public Schools of Knoxville in accordance with the recent holding of the Supreme Court of the United States; and they also requested a meeting with the Board to discuss the matter, but said petition and request were refused.

18. On July 8, 1955, Seventeen (17) Negro parents and again on August 13, 1955, Forty (40) Negro parents petitioned the defendant Board of Education to abolish racial segregation and to work out a plan for desegregation not later than September, 1955 and that desegregation be completed by not later than the school term beginning September, 1956. Said defendant failed and refused to grant said petitions.

19. On June 16, 1955, the Attorney General of Tennessee rendered an opinion to the State Commissioner of Educa-[fol. 54] tion, and through him to the Superintendent of Education for the State of Tennessee, in which he stated that under the Tennessee Code it is the responsibility of each local school board to determine for itself the way in which it will meet the problems of desegregating the schools under its jurisdiction. As a result of this opinion, together with the decision of the United States Supreme Court in the Brown decision, the Knoxville Board of Education in a special meeting held on August 17, 1955, resolved that it believed that respect for and compliance with laws of our country as interpreted by the legally constituted authorities is fundamental to the American way of life, and that as a result of this belief, the Board resolved that it would act in good faith and would proceed in an orderly manner to make a prompt and reasonable start in desegregating the public schools of the City of Knoxville. On the basis of these considerations, the Board at this special meeting instructed the Superintendent and his administrative staff to develop a specific plan of action leading to the gradual integration of the Knoxville Public Schools. (See page 3, Exhibit No. 10 to the deposition of Thomas N. Johnston.)

20. The Knoxville Board of Education at the time of the second Brown decision on May 31, 1955, and continuing until January 1, 1956, consisted of the following members: Wallace Frazier, W. Hoyle Campbell, H. L. Bradley, D. A. Cooper, and Andrew Johnson.

21. At the special meeting of the Board of Education on August 17, 1955, the Board made the following announcement: "As previously announced through the local press, the Board of Education has been holding a series of confer-

ences, with the Superintendent of Schools and his staff, and [fol. 55] with the school Principals of both races, for the purpose of identifying and exploring the many problems involved in school desegregation. The participants in these professional conferences have agreed that the ultimate success of our combined efforts in bringing about desegregation will largely depend upon a careful analysis and solution of many factors and practices, such as school zoning, enrollments, applications for transfers, present and future school buildings and facilities, school faculties, overcrowding in some schools in some areas, curriculum adjustments and pupil activities. Through additional conferences and studies, these and other problems will be pursued during the coming school year, 1955-1956. Therefore, in accordance with the language used in the Supreme Court's decree on May 31, 1955, the Knoxville Board of Education believes it is acting in good faith, and that a prompt and reasonable start is being made toward the successful desegregation of the Knoxville Public Schools." (See page 4 of Exhibit No. 10 to the deposition of Thomas N. Johnston.)

22. W. Hoyle Campbell and H. L. Bradley, members of the Knoxville Board of Education, and Mr. Curtis Gentry and Mr. E. N. Aslinger, members of the Supervisory Staff of the Knoxville City Schools, made a trip authorized by the Knoxville Board of Education to Evansville, Indiana, leaving Knoxville on July 12, 1955, and returning on July 15, 1955. The purpose of this trip was to study desegregation in the Evansville, Indiana, Public Schools, which began in 1949. A report on this trip made to the Knoxville Board of Education is part of Collective Exhibit No. 24 to the deposition of Thomas N. Johnston.

23. Beginning on January 1, 1956, the Knoxville Board of Education consisted of the following members: Andrew [fol. 56] Johnson, W. Hoyle Campbell, D. A. Cooper, Robert B. Ray, and E. C. Woods.

24. On January 4, 1956, this Court in the case of Joheather McSwain, et al. vs. County Board of Education of Anderson County, Tennessee, et al., ordered the desegre-

gation of the Anderson County High Schools not later than the beginning of the fall term of 1956.

25. Immediately after the Superintendent and his staff were instructed by the Board of Education on August 17, 1955, to develop a specific plan of action leading to the gradual integration of the Knoxville Public Schools, the Superintendent and his staff began holding periodic meetings for the purpose of exploring and discussing all of the available literature on this subject, including the experiences of other school systems and of further identifying the problems involved in desegregation and their solutions. As an outgrowth of these meetings a study counsel composed of all principals, school administrators and supervisors (both white and Negroes) and the superintendent of schools was formed for the purpose of exploring and studying the many possible plans and procedures in school desegregation. This study counsel held an additional series of meetings and formulated several possible plans for desegregation, eight of which were presented to the Board of Education for the Board's study. This study by these study groups and subsequently by the Board of Education, upon its receiving these various plans from the study groups, continued during the remainder of 1955 and the year 1956. This action is reflected in the minutes of meetings of the Board of Education for the meeting held on May 11, 1956, in which the Board of Education announced that each of these plans was being carefully reviewed by the Board of [fol. 57] Education, but that the Board did not feel at that time that desegregation of the Knoxville Public Schools could be successfully put into operation. The Board stated in those minutes that this opinion was based on the following reasons:

"1. In order to provide improved facilities for all sections of the city, it is our belief that any plan of desegregation should not be inaugurated until the present school building program is further advanced.

"2. Based on available information, we do not believe that the people of both races are ready for a definite plan of desegregation at this time, and that further de-

lay in inaugurating the plan will lessen the likelihood of unpleasant incidents which have occurred in some places where desegregation has been inaugurated. It would be detrimental to the schools and the overall objective if a plan of desegregation is not successful in its inception. Therefore, we feel that further time is necessary in order to provide the most favorable atmosphere among both races and for the necessary orientation of parents, pupils, and teachers for the acceptance of a definite plan of action.

"3. It is our hope that we shall reach a point where we can introduce one of the plans under consideration for desegregation at a time and date consistent with a reasonable assurance of the success of the plan selected. Before any definite plan of desegregation is put into operation, we feel that it is important that plans for school integration should be given further study and developed to the extent that children of both races will not be handicapped by this radical change in their classroom life."

[fol. 58] The board continued by saying that it felt that it was acting in good faith and was making a reasonable start toward desegregation of the Knoxville City Schools. (See pages 6 and 7 of Exhibit No. 10 to the deposition of Thomas N. Johnston.)

26. At the regular meeting of the Board of Education on May 14, 1956, the Board was asked to make a statement on the subject of desegregation. In response to this request, Andrew Johnson, Chairman of the Board, read the progress report concerning the desegregation of the Knoxville City Schools, which had been read at the meeting on May 11, 1956 (and referred to in the preceding finding of fact). Following the reading of this statement, Mr. Ralph Martin, of the Beardsley Junior High School area group, asked that lay representatives be added to the study groups. In response to this request, the Chairman of the Board of Education pointed out that each Board Meeting is opened with an invitation to the general public to speak to the

Board on any subject on which it desires, and thus opportunity is afforded to any representative at any time to present any matter which he has in mind. (Reference, page 8 of Exhibit No. 10 to the deposition of Thomas N. Johnston.)

27. On June 7, 1956, the defendant Board by mail was petitioned by the said Negro parents to rescind its said decision to delay indefinitely desegregation of the public schools.

28. At the regular meeting of the Board of Education on June 11, 1956, Rev. R. E. James, Pastor of the Mt. Zion Baptist Church, representing a number of organizations in the City of Knoxville requested the Board of Educa-[fol. 59] tion to reconsider its action on May 15, 1956, in which it had decided to delay the desegregation of the schools. The Board was urged to integrate the schools beginning at the September, 1956 term. At the same meeting Rev. Frank Gordon called to the attention of the Board a petition or communication which had been forwarded by the National Association for the Advancement of Colored People to the members of the Board the previous week, which requested some statement from the Board concerning desegregation. Rev. Gordon requested that the Board give some answer as to its reaction to the communication. A number of Negro parents of children of school age and other citizens also personally appeared and petitioned said Board to reconsider its immediate previous action or decision, and proceed to desegregate the public schools. The Board answered the request and petition with the reply, "No".

29. The Louisville, Kentucky, Board of Education plan of desegregation to take effect September, 1956, was furnished the Knoxville Board of Education by Superintendent Johnston (in October, 1956) for the Board's information and study. This information is part of Collective Exhibit No. 24 to the deposition of Thomas N. Johnston.

30. On January 4, 1956, the United States District Court at Knoxville, being the same Court and Judge as in the present case, ordered that the Anderson County, Tennessee, high schools be desegregated no later than the opening of

the fall term of 1956. The date fixed by the Anderson County Board of Education for opening of schools was Monday, August 27, 1956, and before that the Board announced that the Court's order would be obeyed.

According to news reports which came to the attention of the defendants in the present case, one John Kasper ap- [fol. 60] peared in Clinton, Anderson County, Tennessee, shortly before said date set for the opening of the high schools, denounced the planned desegregation, held mass meetings, formed picket lines and sought to excite public opinion; during the week of August 27, mass meetings were held and mobs were formed, threats to the lives of the Principal of the high school and the Negro students were made. However, good order prevailed in the school the first few days; National Guardsmen to the approximate number of 600 and State Highway Patrolmen 100 strong were sent into Clinton to restore and preserve order, Kasper was served with an injunction which he ignored and in consequence, he was promptly sentenced to one year in Federal Prison, in September a Negro pupil's home was blasted, in October a convocation of 125 automobile loads of hooded persons paraded in Clinton, burned crosses and chased newsmen from their rallying place, in November Negro pupils were subjected to rock and egg throwing and the school Superintendent resigned because of these troubles, in December 16 persons from Clinton were arrested for violating a restraining order of the Federal Court, and the Attorney General of the United States ordered the F.B.I. to investigate the Clinton disorders.

In March, 1957, John Kasper and John Gates, the latter being a resident of Anderson County, Tennessee, were arrested for violating the Court's restraining order originally issued on August 29, 1956, and made permanent on September 6, 1956.

During March, 1957, a Negro senior at Clinton High was expelled for fighting with a white boy. A student and part-time clerk in Principal Brittain's office at Clinton High School was beaten up by white boys.

A suitcase of dynamite exploded in a Negro section of Clinton, Tennessee, near the expelled Negro's home.

[fol. 61] In June, 1957, D. J. Brittain, Jr., resigned as Principal of Clinton High School in Clinton, Tennessee, and the first Negro, Bobbie Cain, graduated from Clinton High School without incident.

31. On September 4, 1956, at the beginning of the school term, the defendant Board of Education denied Negro pupils admission to certain schools solely on account of race or color.

On January 7, 1957, an action was filed in the District Court of the United States for the Eastern District of Tennessee, Northern Division, by said children and their parents seeking declaratory relief and admission to the public schools of Knoxville on a racially unsegregated basis and without discrimination on account of race or color; and seeking an injunction restraining defendants from operating a compulsory racially segregated school system in the City of Knoxville. The said cause was styled Dianne Ward, et al. vs. The Board of Education of the City of Knoxville, Tennessee, et al., Civil Action No. 5158.

32. At the regular meeting of the Knoxville Board of Education on June 10, 1957, John Kasper appeared before the Board, identifying himself as the Executive Secretary of the Tennessee White Citizen's Council and informed the Board at that time that he represented a group of the Knox County Council of the State Association. Kasper stated that the group desired clarification of the Board of Education's policy regarding integration, wished to express the view that the Federal Judge should determine when and how integration should take place, presented in brief their policy regarding this question, and recommended that the members of the Board resign in protest to the action of the Courts. Andrew Johnson, Chairman of the Board of [fol. 62] Education, informed Kasper that the members of the Board were defendants in a lawsuit and that they would proceed with their defense. Chairman Johnson stated that he as an individual had no intention of resigning in face of current problems, and that the Board was not in the position of telling the Court what to do, but simply to furnish information to the Court in the best interests of the citizenry of the City of Knoxville. Board members W.

Hoyle Campbell and Robert B. Ray expressed concurrence with the views expressed by Chairman Johnson. Chairman Johnson suggested to Kasper that if he had information pertinent to the subject that he present it to the Courts as a friend of the Court. (See page 14, Exhibit No. 10, to the deposition of Thomas N. Johnston).

33. Desegregation in the schools of Little Rock, Arkansas and Nashville, Tennessee planned for September, 1957, according to news reports coming to the attention of defendants in this case was marked by violence in that in Little Rock mob violence broke out, soldiers of the United States under Presidential orders enforced order and guarded safety until withdrawn in December, 1957, and in Nashville, Tennessee, an elementary school was bombed in September, 1957, and severely damaged.

34. On or about March 16, 1958, newspapers reported that Nashville, Tennessee police felt it necessary to put the home of William E. Miller, Judge of the U. S. District Court, Middle District of Tennessee under protective surveillance, by reason of an anonymous phone call which also mentioned the bombing on said date of the Jewish Community Center in Nashville, which may or may not have been related to the desegregation of the Nashville schools. [fol. 63] Since this was well publicized, it came to the attention of the defendants in this case.

35. On October 5, 1958, Clinton High School in Clinton, Tennessee, was bombed causing an estimated damage of between $250,000.00 and $300,000.00. The Knoxville Board of Education was well aware of this most publicized and controversial act of lawlessness which took place in this neighboring town.

36. Despite the above incidents of violence in connection with desegregation of public schools, and other like incidents in many other cities having a tradition of segregated education, in most cities of the United States desegregation in public education was either already customary, or, was accomplished without violence under the *Brown* decision, for instance, Washington, D. C., Baltimore, Md., Oklahoma City, Oklahoma, Louisville, Ky. and St. Louis, Mo.

37. Beginning on January 1, 1958, the Knoxville Board of Education consisted of the following members:

Dr. John H. Burkhart, Mr. Robert B. Ray, Mrs. Gilmer Keith, Dr. Charles R. Moffett, and Mr. E. C. Woods.

38. On June 1, 1959, this Court dismissed the suit of Dianne Ward, et al., vs. the Knoxville Board of Education, et al., Civil Action No. 3158, as against three of the five members of the Board of Education who had been replaced on the Board by three new members as a result of the 1957 election. Since the suit was dismissed as to a majority of the Board, the plaintiffs in that action chose not to prosecute it any further, and an order dismissing the case without prejudice was entered December 16, 1959.

[fol. 64] 39. Beginning at the regular meeting on July 13, 1959, and continuing from time to time through March, 1960, persons appeared before the Board of Education representing certain organizations such as the National Association for the Advancement of Colored People, the White Citizens Council, the Knoxville Area Human Relations Council, the Fellowship House, Inc., and Knoxville Round Table of Christians and Jews. The representatives of these groups would express the views of their respective organizations and in a few instances present to the Board of Education a petition drawn by the officers and/or members of their particular organizations.

40. On or about July 9, 1959, Twenty (20) Negro parents of school age, nine of whom are adult plaintiffs, petitioned the defendant Board in writing to consider on or prior to its regular meeting on July 13, 1959 the admission of their children at the fall term of 1959 to the public schools of the City of Knoxville on a racially unsegregated basis; and, among other things, that they work out a plan for desegregation as soon as possible. Other citizens of Knoxville personally appeared with said petitioners before the Board at its said regular meeting and joined in the aforesaid request of petitioners. The defendant Board refused to take any action on said petition.

41. Beginning on January 1, 1960, the Knoxville Board of Education consisted of the following members:

Dr. John H. Burkhart, Robert B. Ray, Mrs. Gilmer Keith, Dr. Charles R. Moffett and Roy E. Linville.

42. The average teacher loads are substantially the same as to white and Negro schools in the Knoxville school system, there being an average of 29.1 pupils per teacher in the white elementary schools for the school year 1958-1959, [fol. 65] while there were 30.5 pupils per teacher in the Negro elementary schools for the year 1958-1959.

43. In accordance with an order by this Court entered on February 8, 1960, requiring the Knoxville Board of Education to submit a plan to this Court by April 8, 1960, for desegregating the schools of the City of Knoxville, the Knoxville Board of Education on April 8, 1960, submitted to this Court for its approval the following plan which is known as Plan No. 9, being one of the nine plans which the administrative staff has developed by its study and workshops during the years since July, 1955:

"1. Effective with the beginning of the 1960-61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961-62 school year racial segregation shall be discontinued in Grade Two and thereafter in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.

3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the school of their zone to another school

[fol. 66] will be given full consideration and will be granted when made in writing by parents or guardians of those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

6. The following will be regarded as some of the valid conditions to support requests for transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only;

b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

44. The members of the Board of Education are continuously changing while the members of the administrative staff remain relatively constant. Therefore, in August, 1955, the Knoxville Board of Education instructed its administrative staff to study and formulate plans, conduct workshops with principals and teachers of both races, to accompany Board members to Evansville, Indiana, where desegregation was being put into operation and to generally fill in all details on the many administrative problems which would be entailed in accomplishing desegregation such as, but not limited to, the redistricting of the schools so as to utilize most efficiently the capacity of existing school buildings, the establishing of a new and broader transfer system, overcoming the increased difficulty in obtaining and keeping [fol. 67] teachers, overcoming any difficulties incident to any differences in achievement levels among students including any difference between such levels possibly existing among Negro children and white children. By proceeding in this manner, the Board of Education was obliged mainly to study and discuss the various information and plans furnished to it from time to time by its administrative

staff, thereby endeavoring in good faith to determine when and what plan of desegregation would be proper for the Knoxville schools.

45. Although the Knoxville Board of Education has not acted in haste to adopt a plan of desegregation, it has had the opportunity to observe plans which were being established in other cities, the opportunity to observe the formulation of the law in the field of public school desegregation during the period since the Brown decisions by the Supreme Court, and has had the opportunity to watch the local conditions which have developed during the period since the original Brown decisions, including the attitudes and reactions of the citizens of Knoxville to the change of traditions, customs, and local law insofar as such attitudes and reactions would influence sound principles of school administration and the orderly process of education which is so imperative for any school system if it is to provide the high quality of education to all of its children during a period of history when education has become of the utmost importance throughout the world.

46. The Knoxville Board of Education and its staff, has considered the rights of the individual Negro students, the efficient operation of the schools of the City of Knoxville and also, so far as it was relevant to the school problem, the public welfare of the citizens and the community, the [fol. 68] preservation of good relations between the races, and the desirability of a transition free from violence

47. The defendant Board of Education has had regular monthly meetings before and since the aforesaid meeting on September 14, 1959 and has also had several call meetings since that time, but it has taken no action to admit said infant plaintiffs to the respective schools for which they applied, and the defendant Board also did not take any positive and concrete action beyond studies and conferences of the nature above indicated, to desegregate the public schools of Knoxville until April 4, 1960 when they adopted the plan which was filed with the Clerk of the District Court on April 8, 1960. Said plan was adopted and filed only after the defendant Board of Education was directed

by the Court at the hearing on February 8, 1960 to adopt and file a plan of desegregation by April 8, 1960.

48. The depositions of both the plaintiffs and the defendants heretofore taken in this cause may be offered and used as evidence, subject to timely objections, by both the plaintiffs and the defendants, but the right is reserved to all parties to put the deponents on the witness stand at the trial.

This fourth day of August, 1960.

[fol. 69]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * * * * * *

The Court: That is all right. Gentlemen, so that there will be no misunderstanding about it, if there is anything in any of the depositions that you think are material, or is material, and that you want the Court to hear it, and by so hearing it it will enter into the decision of the Court, then you should read it to me because I will not go to this record after we finish this hearing and decide this lawsuit on something that has not been read to me—at least I do not think that I will.

So I am expecting you to point out to me those things that are pertinent and the things that I ought to hear in order to properly decide this case, because I will not go through that record without it being called to my attention. As I say, I don't think I will. I reserve the right, of course, to go through it if I think it is necessary. But I am expecting to be done here on this oral hearing which ought to be done because I don't think it was intended under the new rules for this Court to do like was done under the old chancery proceedings; namely, go through a lot of papers in order to decide the lawsuit. I expect to be able to decide it from what I hear today and tomorrow.

* * * * * * *

Mr. Fowler: I have asked Mr. Claude Robertson of our firm to help in this reading.

This is the deposition of T. N. Johnston, beginning on page 2 on line 5. This is examination by the plaintiffs' counsel.

[fol. 70]

EXCERPTS FROM DEPOSITION OF T. N. JOHNSTON

"T. N. JOHNSTON being first duly sworn, was examined and deposed as follows:

"Direct examination.

"By Mr. Williams:

(The deposition was read by Mr. Fowler and Mr. Robertson.)

"Q. Sir, will you state your name.
"A. T. N. Johnston.
"Q. Are you a resident of Knoxville, Tennessee?
"A. Yes, sir, Knoxville, Tennessee.
"Q. Mr. Johnston, what is your occupation?
"A. I am Superintendent of Knoxville City Schools.

. . . . . .

"Q. Mr. Johnston, how long have you been Superintendent of the Knoxville City Schools?
"A. Approximately five years. Since June 15, 1955. Five years ago today.
"Q. Mr. Johnston, will you state your duties and responsibilities as superintendent?
"A. Well, as superintendent my duties are, you might say, to operate the Knoxville City Schools as the chief executive officer of the Board of Education, to carry out its rules and regulations and policies.
"Q. In connection with that, is it part of your duties to be apprised of and keep the board fully informed as to the complete government and operation of the city schools so as to enable them to establish policies?
"A. Yes, I interpret those to be part of my work, yes, sir.
[fol. 71] "Q. And you do function in that regard?
"A. Yes, sir, to the best of my ability.
"Q. Are you appointed or elected in your office as superintendent?

"A. I am appointed by the Board of Education, not elected by the people.

"Q. And you are then an officer and agent of the board?

"A. That's correct.

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OFFERING OF EXHIBITS

Mr. Fowler: Now, your Honor, I will refer to these exhibits. Mr. Johnston was asked about a lot of material that was put into the record. I do not have even in my file a complete copy of all of it.

The Exhibit No. 1, which was filed in page 7 of Mr. Johnston's deposition, is a directory of personnel of the Knoxville school system for the years 1959-60.

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(Exhibit No. 1 was filed.)

Mr. Fowler: Exhibit No. 2 is an annual report of the Board of Education. Let me ask Mr. Johnston, did we discuss a complete copy of that for the year 1959-'60?

Mr. Johnston: It is not compiled. It will be in about two weeks.

Mr. Fowler: The report actually filed as an exhibit, the annual report of the Board of Education of Knoxville, is for the years 1958-59. I offer that as Exhibit No. 2.

[fol. 72] The later report for the 1959-60 year has not yet been completed.

(Exhibit No. 2 was filed.)

Mr. Fowler: Exhibit 3 is a map of the existing school zones. There are two maps. One is 3-A for the white schools, and the other is 3-B for the Negro school.

As soon as we get that exhibit it will consist of two parts, as I stated. Under the segregated system there were white schools and Negro schools. Exhibit 3-A shows the zones for the white elementary schools, as I understand it, and the Exhibit 3-B for the Negro elementary schools.

There is one part of this exhibit that we wish to refer to at the present moment. The relevancy will be to the new plan of redistricting and to a claim of the plaintiffs that

racial considerations entered into the anticipated matter of transfers from one school to another in the future.

(Exhibits 3-A and 3-B were filed.)

Mr. Fowler: Exhibit 4 is a map which was offered by the plaintiff and filed as an exhibit; and we offer that also. It shows the Negro population. There is only one copy of this exhibit and it was lodged with the clerk, or should have been.

(Exhibit No. 4 was filed.)

Mr. Fowler: Exhibit 5 is a map of the schools in the Knoxville urban area.

(Exhibit No. 5 was filed.)

[fol. 73] Mr. Fowler: Exhibit 6 is a study of the number of Negro pupils in each Negro community.

Your Honor, I may say, I do not think these maps will be referred to until toward the end of the hearing, and we can proceed.

(Exhibit No. 6 was filed.)

Mr. Fowler: Exhibit 7 is a list of the number of classrooms at each school and the capacities.

(Exhibit No. 7 was filed.)

Mr. Fowler: Exhibits 8 and 9 are lists of the technical or vocational courses offered at Fulton High School during the past school year, and technical and vocational courses offered at Austin High School during the past school year. It is a combined paper.

(Exhibits 8 and 9 were filed.)

Mr. Fowler: Exhibit 10 is a Collective Exhibit being minute entries in the Board of Education since May, 1954, pertaining to the subject of desegregation.

(Exhibit No. 10 was filed.)

Mr. Fowler: Your Honor, under your Honor's request that all portions to be relied on be read, I will have to read all of Exhibit No. 10.

Mr. Fowler: Exhibit 10 is a copy of those portions of the minutes of the Board of Education of the City of Knoxville [fol. 74] which relate to the subject of desegregation since May, 1954, which was the date of the first Brown decision. And it states the handling that was given initially immediately after the second Brown decision in May of 1955 where the board directed the administrative staff to study the problem and the board recited its own consciousness of the change in the constitutional background and of its obligation to go ahead.

This recites the plans that were offered by the board after the various conferences and designation of the particular groups with which it conferred.

This Exhibit 10 also deals with the presentation of petitions from time to time of various Negro parents and also by representatives of the various organizations that were interested in the subject and in short presents the minutes that were taken in formal actions before the board.

Your Honor, in using the word "formal" and emphasizing it, I should state that the board's serious, frank deliberations on the subject of desegregation were not in the formal open meetings.

The testimony of certain witnesses indicates that what they call executive sessions were held when they felt they could deal more effectively in their discussion with the problem.

So we will introduce Exhibit No. 10 and rely on it.

The Court: All right.

Mr. Fowler: Exhibit 11, regulations as to transfer and assignment. As I understand it, those are the existing regulations. We do not know of any specific portions now that are pertinent.

[fol. 75] (Exhibit No. 11 was filed.)

Mr. Fowler: Your Honor, defendants are not interested in filing Exhibit 12 or Exhibit 13, nor Exhibits 14 and 15. As a matter of fact, we would object to Exhibit 14, which is a book or report informally written by the superintendent of schools of Washington D. C. So we skip those as far as our own case is concerned.

Mr. Williams: May it please the Court, I assume that, associate counsel just brought up the suggestion as to whether we should point out now that we plan to offer these and have the Court rule on that at this point or wait.

The Court: When your time comes you may introduce yours numerically as he is doing.

Mr. Fowler: Exhibit 16 we offer as showing the construction program—

The Court: This will be Exhibit 12.

Mr. Fowler: Exhibit No. 12, your Honor presents the construction program of the Knoxville City Schools from 1946 on in detail. It consists of a lot of figures and just read as a whole would not be as intelligently presented as in argument drawing figures from it. We intend to rely on it.

(Exhibit No. 12 was filed.)

Mr. Fowler: The next exhibit, Exhibit 13, is the new map or new zones purported for plan No. 9, which is the plan recommended by this school board. That was filed as Exhibit 17 to the deposition and now becomes Exhibit 13.

(Exhibit No. 13 was filed.)

[fol. 76]. Mr. Fowler: As Exhibit No. 14 we offer a tabulation comparing teachers salaries, white and Negro, and show there is no difference. That was Exhibit No. 23.

Mr. Fowler: And as Exhibit 15 we offer the exhibit which was filed as No. 24 to Mr. Johnston's deposition, which is a collective exhibit consisting of many papers as follows:

First, a booklet entitled "Selected Material Relating to School Desegregation Prepared for Exclusive Use by the Knoxville Board of Education, Knoxville, Tennessee, March 7, 1956."

It is in the nature of a report or summary prepared by the school superintendent for the board members at that time. It sets out the Supreme Court opinion and the decree, statements of the Knoxville School Board—well, statement of the Attorney General of Tennessee in June of 1955; statements of the Knoxville Board of Education in July, 1955, a statement of policy of the board in August, 1955;

a copy of a memorandum opinion of this Honorable Court in McSwain against Anderson County Board of Education in January of 1956, and it sets out eight plans which the board might consider, setting them out without recommendation for the consideration of the Board of Education. Those plans are referred to in the deposition or evidence from time to time as plans 1 to 8.

Exhibit 15 also includes a document filed as Exhibit 10. It includes the plan filed herein on April 8, together with a statement of comments attached to it and a chart showing [fol. 77] the composition of the administrative bodies which compose the State system of education. And there are other papers, the Louisville, Kentucky, plan of desegregation; a report on the trip to Evansville, Indiana, in July, 1955; the complaint in the Diane Ward case; a resolution of the Atlanta Board of Education in November, 1959, as to their own plan; memorandum opinion of Judge Miller in the District Court of Nashville in the Kelly case, the Nashville case, and a copy of the Nashville plan which is included so that it may be considered so far as it is relevant to this case.

(Exhibit No. 15 was filed.)

Mr. Fowler: Those are all of the exhibits we desire to offer from Mr. Johnston's deposition, and we are going to put him on the stand so we won't read now any part of his deposition.

The Court: Are the papers to which you recently made reference included in Exhibit 15?

Mr. Fowler: Yes, Exhibit 15.

Your Honor, we will read portions of Doctor Burkhart's deposition. Page 1—rather page 2.

EXCERPTS FROM DEPOSITION OF DR. JOHN H. BURKART

"DR. JOHN H. BURKHART, being first duly sworn, was examined and deposed as follows:

"Direct examination.

"By Mr. Williams:

(The deposition was read by Mr. Fowler and Mr. Robertson.)

"Q. Will you state your name, please, sir.
"A. John H. Buckhart, M. D.
"Q. Dr. Burkhart, are you a resident of Knoxville?
"A. Yes, sir.
[fol. 78] "Q. How long have you lived here?
"A. All my life, 40 years.
"Q. And you are a practicing physician in Knoxville?
"A. Yes, sir.
"Q. You are also a member of the City Board of Education of Knoxville?
"A. Yes, sir.
"Q. And a defendant in this lawsuit?
"A. Yes, sir.
"Q. How long have you been a member of the school board?
"A. January 1, 1958.
"Q. You were elected in the election in what month preceding that?
"A. November, 1957.
"Q. November, 1957?
"A. Yes, sir."

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"Q. Dr. Burkhart, did you participate in any meetings or sessions of the board between the time you were elected in November, '57, and the date when you actually assumed office in January, 1958?
"A. Well, not that I recall. That's about two and a half years ago, and I do not recall participating in any meeting.
"Q. Did you as either an observer or as an active participator, I mean?

"A. Now let me cogitate a moment on that. Yes, I did observe the meeting of the last month of the old Board of Education before I was elected. I was invited as a courtesy to come down after my election at the December meeting, I believe, in 1957. I sat in on that meeting, public meeting.

"Q. I suppose you don't remember the date of that, but the minutes would show.

[fol. 79] "A. It would be, I assume, the second Monday in December. I don't recall the date.

"Q. Now, Dr. Burkhart, did you have any discussions at that board meeting, or at any other time prior to the time you assumed office, with regard to the position that you would take regarding the lawsuit which was then pending against the Board of Education?

"A. No, sir.

"Q. Wasn't counsel for the school board, Mr. Fowler, representing you at the time?

"A. Representing me prior to my—?

"Q. Yes, as a member elect to the board.

"A. Not to my knowledge. I was not an installed member of the board until January 1, 1958.

"Q. Did you know then that counsel for the school board appeared at the call of the docket in December of 1957 and announced to the Court that or requested a continuance of the case in order that you and the two other board members elect would be allowed an opportunity to consider the question of desegration?

"A. Are we still talking about prior to January 1, 1958?

"Q. Yes, sir.

"A. Of course, Mr. Williams, those dates are hazy as to when what was done, but I don't recall that between the time of my election and January 1, 1958; no, sir.

"Q. Do you recall anything about there having been such a statement made in court?

"A. In court?

"Q. Do you recall anything about such a statement being made? Did you know anything about any such statement?

"A. Prior to January 1, 1958?

"Q. Yes, sir.

"A. No, sir.

[fol. 80] "Q. You didn't know. After January, 1958, did you know of any such statement?

"A. Yes, sir.

"Q. What did you learn with regard to that statement?

"A. As I recall, I learned some time after I became a member of the Board of Education that counsel for the Board of Education had requested that the case then pending be extended or at least—well, I am not sure. Let me think a minute.

I do recall learning that the case as it was originally filed listed the five members of the board who were not the five members of the board after January 1, 1958."

Mr. Robertson: This is beginning on the portion you designated.

Mr. Fowler: We designate this but we will just read all of it.

(The reading of the deposition was continued.)

"There were three members of the board that were new after January 1, 1958, including myself, and counsel for the Board of Education made a request that the case be postponed or hearing of the case be postponed, or perhaps —and I am not clear, and this is past history that doesn't involve my memory, because it wasn't concerned with our present case, I didn't think.

I am not clear whether it was asked that it be postponed or whether it was asked it be dropped on account of the fact that it did not list the three members who were then on the Board of Education, the three new members. I learned of that after that.

[fol. 81] "Q. This is your first recollection of the matter, that it was asked that it be dropped on account of having been—

"A. It wasn't a valid case as it was so constituted because the three men named as defendants were no longer members of the Board of Education.

"Q. This was your first contact and the first information that you received with regard to the case after you assumed your office?

"A. As I recall it, it is.

"Q. Do you remember at what time after you assumed office that you received this information?

"A. No, sir.

"Q. Do you recall who you received this information from?

"A. No, sir, I don't recall that in enough exactness to state. I am sorry.

"Q. Would you say that that would be at the first board meeting or was it after you assumed office?

"A. I would say it would be very early. At the first board meeting or closely thereto. Very early in the year.

"Q. Was anything further said about the lawsuit then pending or about the issue of desegregation then or at any time thereafter?

"A. Oh, yes.

"Q. You say something further was said at that meeting about—

"A. You said that meeting or thereafter. Considerable has been said thereafter, after that meeting. In fact, I couldn't be specific about when what was said, but I can say I believe without fear of being wrong that the discussion of this matter has come up at nearly every time this board has met formally or informally since January 1, 1958.

[fol. 82] "Q. What would happen when it would come up?

"A. Well, we would discuss the situation, the current status of any suit. I remember at the time when there was a suit, the original suit and the names were substituted, as I recall, we discussed our answer to the suit if it became necessary to answer it.

And then, as I remember, this was later, and how much later I don't know, but it was later—simply ruled, I believe, not—whatever the term is, at least it was dismissed.

So then there was no necessity for our taking any action on that particular suit as defendants. So the rest of the time up until the new suit was filed we simply discussed what we would do or what we should do in terms of bringing about our response to the direction of the Supreme Court as we understood it.

And as we understood it, and I am speaking now—I guess I shouldn't speak for all members of the board, because this was not a definite action, but this was an opinion I have as to how we can state it, that our best policy was to delay while certain changes gradually took place in the thinking of the people of the community, if they would. But that we didn't feel disposed to initiate any action at that time until then we became defendants in the second suit.

And after that our discussion, of course, became a little more concentrated on our defense in that particular suit.

"Q. I see. So from the time when you took office in January, assumed office in January, 1958, up to the time when the former suit—that is, the suit of Ward vs. Board of Edu-
[fol. 83] cation—was dismissed by the Court, the board devoted itself entirely to the question of getting the lawsuit dropped?

"A. Well—

"Q. And discussing the lawsuit?

"A. More or less that suit, yes. And the question as to whether or not it would be held or whether the suit would continue on, and when that suit was dropped, of course, then there was none pending against us.

"Q. Did the board ever actually consider any actual steps for plans for desegration?

"A. Yes, sir.

"Q. When was the first time that the board considered any plans for desegregation?

"A. The present board?

"Q. Since you have been on there?

"A. Since I have been on the board. Well, I couldn't say, but I would say very early in 1958 the board began to consider possible plans. Never any one plan specifically to the exclusion of others, but considered possible plans for bringing about desegregation.

"Q. What do you mean by consider?

"A. I mean talk over the pros and cons of the various plans.

"Q. This was at board meetings also?

"A. At board meetings. At informal conferences on other matters the subject might come up.

We meet, for your information, Mr. Williams, the second Monday of each month in open meeting, and then we meet a number of times on call meetings and conferences and special occasions for various things, budget hearings, etc.

"Q. Incidentally, I omitted asking you at first, what is your term as a member of the board?

"A. My term is four years, expires January 1, 1962.

[fol. 84] "Q. I suppose under the Knoxville charter three members are elected at one election and two others at another. They are staggered; is that correct?

"A. Yes, sir.

"Q. And the term is four years?

"A. Yes, sir.

"Q. You and Mrs. Moffett—

"A. Me and Dr. Moffett and Mrs. Keith.

"Q. Were elected in November, 1957?

"A. Yes, sir.

"Q. You say you all talked about several plans for desegregation?

"A. Yes, we talked about several plans. All possible arrangements. With 12 grades there are many different arrangements, of course.

"Q. Did you ever take any steps with regard to any of these plans?

"A. No, sir.

"Q. Who were these plans proposed by?

"A. Well, they weren't necessarily proposed plans that I am talking about. I am talking about considering 12 grades to be segregated, to be desegregated, that there are almost an unlimited number of possible ways of doing it. Either all at one time; none—of course, that's a plan. Any variation in between. One, three, five, seven, or nine, or back down the other way. One grade, working from the middle each way. It is unlimited as to the way it could be done.

"Q. Are you saying that none is a plan for desegregation? Desegregating none of the grades is a plan for desegregating some of the grades?

"A. I am not saying that. I am saying that is a possibility of an action. All or none, any variety, any place in between.

[fol. 85] "Q. That is, as a matter of fact, the action, the only action that the board took—desegregation of none of the grades; is that correct?

"A. Well, yes, that wasn't action actually. That was just leaving things at the status quo. It was a lack of action, I presume.

"Q. After considering these plans, did you ever make any investigations with regard to the actual administrative operation of the plans?

"A. I am afraid I don't understand that question.

"Q. Well, what were some of the plans which you considered?

"A. Well, as I stated, we considered the possibility of completely desegregating all 12 grades at one time.

"Q. Yes, sir. Well, now—

"A. That is one of them.

"Q. Yes, sir. Now with regard to that, was any survey or investigation made to determine what administrative measures would be necessary in order to have to do that?

"A. You mean how many schools would be involved?

"Q. Yes, and how many pupils would be involved?

"A. Not to my knowledge.

"Q. Were there any conferences with pupils, with teachers, or principals, with regard to any of these plans?

"A. You mean did the board engage in any conferences or interviews with them?

"Q. Or did the board receive information from the superintendent to the effect that he had done so?

"A. Not to my knowledge.

"Q. So that the board never received any conclusions or factual data from the superintendent based on any conferences with teachers or otherwise?

"A. Regarding the plan just mentioned?

[fol. 86] "Q. Yes.

"A. The total?

"Q. Regarding total plan or any other plan?

"A. Well, now, we are getting more broad. Let me think a moment on that.

"Mr. Fowler: Read me that question, please.

"(The question was read by the reporter.)

"A. Now, Mr. Williams, let me say that you are sort of trying my memory.

"Q. I am sorry, Doctor.

"A. I hope you will realize that this is a duty of mine which is to a large extent secondary to a duty which takes a great deal more of my time, that of the practice of medicine. I am not involved in this day in and day out, 12 hours a day. Therefore, my memory gets confused because other things come in its place, such as treatment of patients.

I may make a false statement. If I do, it is an honest error, but I don't recall any information that I received relative to any conferences that were held with teachers or principals regarding that sort of thing.

Now I will say that we have received information all along as to enrollments in the schools, as to how many live within certain areas. That type of thing we are constantly provided with that information, as regards different other matters of school population fluctuation.

"Q. You are chairman of the board, are you not?

"A. Yes, sir. I wouldn't want to leave the impression we don't get any information from the administrative staff [fol. 87] relative to the number of students involved in anything and that has to do with the school system.

"Q. Did you specifically receive any information with regard to, and do you have any information with regard to the number of Negro students who would be involved in the various schools, if, for example, the total integration plan were put into effect?

"A. Not to my knowledge do I have anything that shows me exactly how many students would go to what school in case we did that.

"Q. Has the board at any time since you have been a member, Dr. Burkhart, had any conferences or workshops with or sponsored any conferences or workshops with Parent-Teacher Associations regarding the question of desegregation of the schools?

"A. Not to my knowledge. I don't recall any.

"Q. Has the Knoxville city school system sponsored any teacher workshops regarding desegregation of the schools at any time since you have been a board member?

"A. I am not able to answer that question very well. I am sure that a lot of teacher workshops are being held almost constantly or certainly on regular schedule. What is done in those teacher workshops I am not sure about.

"Q. You are familiar with them?

"A. No. But we did not, I don't believe, specifically instruct anything of that type.

"Q. Has the board sponsored any community workshops—

"A. No, sir.

"Q. —regarding desegregation?

"A. No, sir.

"Q. Has the board either directly or indirectly partici- [fol. 88] pated in any community workshops regarding the desegregation issue?

"A. Not that I recall.

"Q. Dr. Burkhart, since you have been a member of the board, have there been any requests made by parents of Negro or white children for desegregation of the schools, either oral or written?

"A. Yes, sir.

"Q. Do you recall when the first of those requests was made after you became a member of the board?

"A. I don't recall exactly, but it could have been the very first meeting. It seems that we had them pretty regular.

"Q. At almost every meeting of the board?

"A. Every time the issue got a little more life to it. It would die down a while, of course. But we have had several. I can't tell you when they first started.

"Q. Do you recall an occasion in July of 1959, which was last year, when approximately 20 Negro parents came to the board meeting, or petitioned the board to consider both prior to or at its regular meeting on July 13, 1959, the admission of their children in the fall of 1959 to schools on a racially unsegregated basis, and asked you to work out a plan for desegregation?

"A. Well, I would have to refer to the minutes of that meeting to be sure that we were talking about the same meeting and at the same event that you are referring to. I do recall that during the summer of 1959 at least one and perhaps more—at least one meeting a delegation did present such a petition. Whether it was the July meeting or not, I cannot be sure without seeing the minutes of that meeting.

"Q. There was a meeting also in August, wasn't there?

[fol. 89] "A. Yes, sir, there was the second Monday of each month.

"Q. And there was one meeting at which the board went into executive session, and it as a result then publicly announced "it does not intend to integrate the schools at this time but will continue to study the problem." Do you remember that?

"A. I do.

"Q. That meeting on August 10, 1959?

"A. If the minutes say August 10th, then I will concede that is what it is. I remember the meeting. The date I don't recall.

"Q. Will you furnish us the copy of the minute entries for the meetings at which any requests have been made for integration since the 1954 decision of the Supreme Court where the minute entries show that and show what action was taken?

"A. I presume we will. We can. I presume that's perfectly—we can do that. Certainly.

"Mr. Fowler: That is since what date?

"By Mr. Williams:

"Q. At all meetings where requests for integration of the schools were made and the board took action on it which was entered formally on the minutes.

"A. Yes, sir. We will be glad to do that.

"Q. Will you offer that as exhibit which will be Collective Exhibit 10 to your testimony?

"A. Yes, sir."

Mr. Fowler: That exhibit has already been filed as final Exhibit No. 10.

[fol. 90] "Q. And I may state this: When I said where the board took action, I am adopting your statement that non-action constitutes action, so where the board either affirmatively replied or refused to reply to a request for integration. In other words, I understand that some of these the board just said no, or declined to make any answer at all.

"A. Some of them the board just received the petition or the delegation and went right on.

"Q. The minute entry would show that, would it not?

"A. Yes. Sure. Whoever presented the petition. The minutes are very complete.

"Mr. Fowler: You don't want those portions of those minutes which pertain to other matters, irrelevant matters?

"Mr. Williams: No, just the portions which show the request for action with regard to desegregation and any action or refusal to act, or acceptance or filing or anything else on the part of the board.

"By Mr. Williams:

"Q. Dr. Burkhart, would the minutes of the Knoxville board include—are there any minute entries which would include any actions or deliberations of the board in considering any particular plans for desegregation?

"A. Yes, the minutes at which action was taken on a particular plan would show that.

"Q. Was action taken on any particular plan other than the plan which was submitted to the Court in this case?

"A. No, that was the plan that was presented to the board [fol. 91] in the form of a recommendation and was adopted.

"Q. So that no action was taken on any other plans?

"A. No.

"Q. And as a matter of fact, no other plans were ever actually deliberated on. They were just discussed pros and cons?

"A. Pros and cons.

"Q. Based on what the board members personally thought?

"A. That is correct. If you mean any plan was advanced and that plan was voted on yea or nay, no.

"Q. Also I am asking this: Was there any plan advanced and the board considered in connection with that plan any expert advice of educators or scientists or any surveys or any other materials related to administration?

"A. In the same sense that we were talking just then, this plan was presented and these testimonies were heard and the board voted yea or nay, no, that did not occur to my knowledge.

"Q. In other words, then, what has happened throughout, you merely had a discussion of the plan based on the opinions of the Board of Education, of the members of the board?

"A. All merits of each individual plan based on the discussion and consideration of the members of the board, pro and con.

"Q. Is this plan which was finally submitted to the Court in this lawsuit the only plan which has ever been formally submitted to the board with the recommendation of the superintendent?

"A. Yes, sir.

"Q. None of the other plans were actually submitted to the board. You say none of these other plans were ever submitted; is that correct?

[fol. 92] "A. Well, you said were any of these plans formally submitted to the board with recommendation of the superintendent?

"Q. Yes.

"A. No.

"Q. The answer is no.

How were these other plans actually submitted or how did the board come into possession of them, sir?

"A. Well, I thought I made clear that when the board considered the possibilities of a plan, if such a thing became

a necessity, the board then considered by process of elimination every possible plan that it could think of.

"Q. The board never had anything down in writing—it just considered possible ways of desegregation of the grades, the possibility of total grades at one time, or two grades a year?

"A. Yes, sir.

"Q. Or three grades a year?

"A. The various possibilities.

"Q. This was merely a matter of oral discussion on the part of the board?

"A. Yes, sir.

"Q. I am sorry. I did misunderstand you on that.

To get back to the beginning of your testimony, you indicated that the board actually spent its time in considering the feeling of the community in this regard, that they felt that this was not—I won't try to paraphrase you for fear I will misquote you.

But what was the primary consideration of the board in—let me put it another way.

Why did the board decide that no plan at all was the best plan?

"A. Because the board felt that any plan or any method of desegregating the city schools, even down to the—let [fol. 93] me put it. Let me say this. Even down to the one which would desegregate the smallest number of schools, involved the smallest number of schools with the smallest number of pupils desegregated, would disrupt the orderly processes of education to the extent that it would be better if we continued in the way we were doing now with separate but equal facilities.

"Q. Well, Doctor, why did the board feel like desegregation would disrupt the orderly process?

"A. Several reasons. The board felt that since this is a community which is accustomed to that type of educational processes in which the Negro students go to one group of schools and the white students go to another and races are not mixed, that any change would cause tension and perhaps even strife and violence, and that the students themselves would be involved in this rather tremendous

change of custom and tradition to the extent that their education might be handicapped.

And further it was the feeling of the board that the vast majority—and this was the feeling of the board, that the vast majority of the citizens of the community, both white and Negro, did not desire this change to be made.

"Q. Taking the last reason first, what was the basis of the board's feeling that the vast majority of the citizenry, both white and Negro, did not want the change?

"A. Well, it was an opinion based primarily on the fact that only a very small segment of the population made any sort of overtures to the board to change it. [fol. 94] The vast majority of the population certainly did not. And there were considerable expressions from members of the community to the effect that they wished that the board would delay desegregating the schools as long as possible, because they felt like it was not the thing to do.

There was no poll taken. There was no survey, to my knowledge, but based on the reactions that we got from people that we talked to and met on the street who were interested in this, and communications and letters which we received, and our own personal convictions, we felt like it was the best thing.

"Q. This was just primarily based on the board's own personal convictions?

"A. To some extent, substantiated by the convictions of many people who took the trouble of expressing their opinion to the members of the board individually, and collectively.

"Q. There were Negroes who presented themselves to the board representing other Negroes on just several occasions, were there not, since you have been a member of the board?

"A. Yes, sir.

"Q. Beginning shortly after you assumed office?

"A. Yes, sir.

"Q. Then with regard to that aspect of your statement which relates to the vast majority of Negroes, that is primarily based on your personal conviction?

"A. Well, personal conviction that there were about 25,000 Negroes in Knoxville, and we certainly didn't hear from the vast majority to the degree that they prefer that we integrate the schools.

[fol. 95] "Q. Was it the opinion of the board that it would or should have the vast majority of the Negro population of Knoxville before it entered upon any plan of desegregation?

"A. May I have that again?

"Q. Was that the opinion of the board and the basis of its decision not to integrate?

"A. No.

"Q. Well, let me exclude that. Was that the opinion of the board that it should hear of a vast majority of Negroes in Knoxville before it should initiate a plan of desegregation?

"A. Not entirely. That was just one of the factors that I think aided the board in making its decision. The fact that they had not heard from a vast majority of the people in the community to the effect that they desired or would be happy with a change.

"Q. The board was familiar with the Supreme Court decision in Brown vs. Board of Education?

"A. The board was.

"Q. You had read that?

"A. I have read it, yes, sir.

"Q. And you have received legal advice right from the beginning of your tenure on the board on that decision?

"A. Yes, sir.

"Q. Is that correct, sir?

"A. Yes, sir.

"Q. You are familiar then with the principle as enunciated in the decision that the operation of a racially discriminatory or segregated public school system is unconstitutional?

"A. Yes, sir.

"Q. Then the board took the position that it should permit the community to decide whether or not the board operated a constitutionally correct school system?

[fol. 96] "A. No, sir, the board took the position that it was its decision.

"Q. And the board decided based on what it felt, what it speculated the community felt, in making the decision to continue operating a constitutionally invalid racially segregated school system?"

* * * * * * *

Mr. Fowler: The question was repeated.

(The reading of the deposition was continued.)

"By Mr. Williams:

"Q. The board took the position then that it was proper for it, based on what it felt or speculated to be the wishes of the majority of the community, to continue operating a constitutionally invalid racially segregated school system?

"A. That question I can't answer yes or no, because I believe you are implying in that question that the board took the position that it could continue to do what the Supreme Court had stated that it could not do, and therefore was in defiance or in lack of cooperation or in state of being in lack or not cooperating with the Supreme Court.

The board took the position that it could continue to do what had been done in this community for many, many years until such time as it felt that the directions of the Supreme Court could be carried out with the consent and agreement and—well, consent and agreement of the community.

"Q. All right, sir. Now you state that as the other basis of the board's decision that no plan—that non-action was [fol. 97] the proper plan, that the possibility of strife or violence in the community.

Dr. Burkhart, did the board ever study the Louisville plan of desegregation?

"A. By name I am not sure what is the Louisville plan.

"Q. Louisville, Kentucky, where they integrated the schools in one year without violence.

"A. I don't recall that the board ever just discussed or considered that specific plan and—

"Q. Did the board ever read this book, "The Louisville Story"?

"A. I don't know whether the other four members of the board did. I never did.

"Q. This was never presented to the board for consideration?

"A. No, sir. I have never seen that book.

"Q. Did the board ever consider the desegregation plan in St. Louis, Missouri?

"A. What is that plan? Is that a total integration?

"Q. Well, virtually the schools were desegregated over approximately a year and half or two years without incident, without major incident.

"A. I don't recall that the board ever discussed or considered that. It discussed others.

"Q. What situations did the board discuss?

"A. Little Rock, Nashville, and Clinton.

"Q. This was in 1958 after you assumed office on the board?

"A. 1958 and 1959. I am not sure—I am not sure which year.

"Q. Did the board consider the fact that the Nashville integration has gone off without violence entirely?

"A. Well, they considered the fact that it had a school blown up. I consider that violence.

[fol. 98] "Q. And it was based on the school having been blown up in September of '57 that the board decided not to integrate at all?

"A. No. No, that was not the basis. That was just one of the considerations. It was violence that occurred in Nashville, we thought.

"Q. Violence occurred during two or three day period; is that correct?

"A. Occurred during a very short period when they blew up the school; yes, sir.

"Q. Since that time, is the board familiar with whether or not there has been any violence in Nashville?

"A. As pertains to the desegregation of the schools?

"Q. Yes, sir.

"A. I don't know of any other violence that has occurred in Nashville on that basis.

"Q. Then was it the opinion of the board that because there was violence that occurred during the first stage of

integration in Nashville this constitutes a reason for delaying desegregation indefinitely, although desegregation has proceeded in Nashville for the following three years on a peaceful basis, the board felt that it was valid?

"A. Was valid.

"Q. Has the board ever discussed with the police department of Knoxville, the law enforcement officers, with regard to the question of desegregation?

"A. No, sir.

"Q. The board has never investigated the question as to whether or not the police department, the law enforcement authorities of Knoxville, the fire marshal, and other agencies, are adequately equipped to cope with any question of violence?

"A. No, we have never investigated that. We have assumed they would be.

[fol. 99] "Q. You have assumed they would be?

"A. Yes, sir, we have assumed.

"Q. Even while you were taking the position that initiation of a plan should be delayed indefinitely because violence might erupt?

"A. Violence is violence, no matter who wins out in the end, and we consider that our police department and our fire department are competent and equipped and would respond.

"Q. To take care of any emergency which should arise?

"A. Yes, sir, but there still would be violence perhaps.

"Q. Your statement that there would be violence is based on your opinion?

"A. Perhaps. Yes, sir.

"Q. Knoxville is an area which has been noted for its harmonious race relations, is it not?

"A. Yes, sir, and it is our desire to keep them that way.

"Q. Historically, sir?

"A. It was our desire to keep them that way, harmonious.

"Q. And you felt the best way to keep them that way was to keep them segregated?

"A. Yes, sir.

"Q. As a matter of fact, the buses, the ball park, the city municipal amusement park, and the library have been integrated here for several years, have they not?

"A. Well, I know that the—I don't ride the bus. I haven't ridden the bus in years, but I understand they are desegregated. I know the ball park is, and the library may or may not be. I am not sure. But there are certain public facilities in Knoxville that are, yes, sir.

"Q. And all of that occurred without any violence, did it not, sir?

"A. I don't know whether any violence occurred in con- [fol. 100] junction with that, whether anybody got thrown off a streetcar or not.

"Q. You never heard of anything?

"A. No, not that I remember.

"Q. Dr. Burkhart, up to the time that this plan which the board has approved on Wednesday, March 30th—or April 4, 1960, what position had the board taken with regard to submission of a plan to the Court subsequent to the filing of this second lawsuit?

"A. Well, the board had, of course, taken the position earlier when it appeared before the Court in February, I believe, that it would not submit a plan to the Court unless ordered to do so, but would attempt to show cause and did attempt to show cause as to why desegregation of the city schools should not proceed immediately.

"Q. Why did the board take this position, Dr. Burkhart? For the reasons you have stated?

"A. For the reasons I have stated we felt it was in the best interest of the students of the City of Knoxville that desegregation not take place, that we continue the same facilities and arrangements under which we had operated, lo, these many years.

"Q. Continue them indefinitely?

"A. Indefinitely until—indefinitely, of course, is a vague term.

"Q. Until such time as you felt that you could bring the community around to—

"A. Yes.

"Q. —acceptance of it?

"A. Indefinitely does not mean eternally, but it is a vague time differentiation.

"Q. What happened after you took that position that you wouldn't submit a plan at all unless ordered by the Court?

"A. We were ordered by the Court.

[fol. 101] "Q. Then, of course, you would not have submitted a plan at all without being ordered by the Court?

"A. Well, I think that our position of going down or sending our counsel down to show cause why we should not desegregate the schools was pretty much admission of that, that we did not intend as of then to submit a plan.

"Q. Now was there any time that you had planned? Did you intend to submit a plan at any time?

"A. Yes, sir.

"Q. When?

"A. Later.

"Q. By later, what do you mean?

"A. The same thing you meant by indefinitely.

"Q. In other words, you couldn't say then what time you would submit a plan?

"A. No, sir.

"Q. So when the Court ordered that a plan was submitted, what happened in the board after that?

"A. Then the board was presented—when the Court instructed or when we understood that we were instructed to return on a specific date, which I believe was April 8th, with a plan for desegregating the schools, then the superintendent presented to the board a recommendation that the Nashville plan, the grade a year plan, basically, with perhaps a little different wording, but basically the plan of one grade a year be desegregated, beginning with the first grade.

The superintendent submitted to the board that plan with his recommendation that it be accepted.

"Q. And the board thereupon adopted this plan?

"A. Yes, sir.

[fol. 102] "Q. Without considering at that time any other plans?

"A. At that time it was the only plan under consideration, whether or not we adopt it or not adopt it.

"Q. You hadn't considered any other plan between February when you stated that—when the board stated that it wasn't going to submit a plan and the time when this plan was?

"A. Not formally to the point of voting for or against the plan.

"Q. With regard to the 12-year plan, the plan which was recommended by the superintendent, what basis did the board go on in adopting an extended period of 12 years for desegregation?

"A. The feeling that the gradual desegregation of the city schools would permit a longer period of adaptation, and acceptance and create less of a problem of administration, result in less disruption of the orderly processes of education, and in general be preferable to an abrupt change involving the entire student population.

"Q. Did the board discuss these matters before approving this plan?

"A. Yes, sir.

"Q. What problems of administration did the board discuss in connection with the 12-year plan?

"A. The fact that there would be many, many schools involved, if complete desegregation occurred simultaneously, including the high schools, in which we felt there might be more tendency toward strife and reaction and violence.

And the fact that the administration of such a complete and abrupt change would be much more technically difficult because it would involve greater number of students and teachers, and much more of a shift in school popula-
[fol. 103] tion, individual schools being changed from their previous enrollment figures. It just stood to reason, as far as we were concerned, that anything you do that completely overturns the entire system is much more administratively difficult than something you do that involves only a small segment of it.

"Q. Well, I don't know. Did the board feel that the change-over would involve quite a bit of administrative disruption?

"A. Yes, sir.

"Q. In what regard?

"A. In the regard I have just stated, that you would have population shifts. You would have a great number of students changing schools perhaps. That is an intangible we couldn't be sure about.

"Q. Had the board had any census studies made to show what the population shifts were or would be?

"A. Well, not to my knowledge. And not accurate figures because accurate figures are difficult to obtain in a population that moves and changes from one month to the next, and furthermore it is almost impossible to anticipate what students would elect to go where to school, under certain conditions laid down, if they were about transfer rules, etc. But it was just obvious to us where you involve an entire system of 21,000 students which must be changed rather abruptly you create administrative problems of a much greater magnitude than when you involve a much smaller segment.

"Q. If the plan which the board proposed to the Court were to be adopted beginning next school year, how many students would be involved in the first grade?

"A. What was that again?

[fol. 104] "Q. If the plan which the board proposed were adopted for the next school year, how many students, how many first grade students would be involved?

"A. I don't know.

"Q. Did the board have these figures before it at the time that it made this decision?

"A. Not that I recall. Not any accurate figures. It is hard to determine pre-school students.

"Q. The board, the Knoxville school system does not conduct a pre-school census?

"A. Oh, yes. Oh, yes. But I don't recall that we had any accurate figures as to how many students would be going into the schools involved. I am sure the administration—let me put it this way—I am sure the administration knows that. I am sure the administration has spot maps showing the location of these pre-school students and how many students attend, but the board is not always concerned with those exact figures. The board sets policy. It doesn't deal with those smaller things.

"Q. As a matter of policy, did the board ever consider the possibility that if you have—if you are going to have some administrative problems that although it might be argued, as you have stated, that you would minimize the

problem by spreading it out over 12 years, it could also be argued you drag out the problem.

"A. Certainly, it could be argued that it does drag out the problem. It could be argued which is the most desirable, a little pain for a long time or a lot of pain for a short time.

"Q. On what basis did the board reach a conclusion there would be a lot of pain?

[fol. 105] "A. That there would be a lot of pain if we did it entirely, all at once?

"Q. I take it these are the only two things the board considered, either doing it 12 years or doing it all at once; is that correct?

"A. The board had—

"Q. And it—"

Mr. Fowler: I objected on the ground he had not been permitting the witness to answer, so we continue and the question was read, which was: "I take it these are the only two things the board considered, either doing it 12 years or doing it all at once; is that correct?"

The answer is on line 12.

(The reading of the deposition was continued.)

"A. The board had already in its previous action I think determined that it did not desire to desegregate the schools entirely, and had presented itself before the Court through its counsel to that effect.

Then when it was instructed to return on a certain date with a plan, the plan which it considered was the plan recommended to it by the superintendent, which was the one grade a year plan. And we considered the pros and cons of accepting or rejecting that plan.

"Q. What are some of these pros and cons? That is what I am trying to drive at, Dr. Burkhart, without going into why it is obvious that you would have more administrative problems. That is a conclusion.

"A. Yes, sir.

[fol. 106] "Q. Would you kindly state, sir, what are some of the actual administrative problems that the board considered on which it bases its 12 year plan?

"A. The board, I believe, acted under the assumption

that it must submit to the Court a plan for desegregating, for the orderly desegregating of the city schools.

"Q. Yes.

"A. The board then felt that if that was the compulsion that it was under, that it could do that most easily by desegregating one grade at a time, to permit a gradual adjustment and gradual change, to minimize the number of students involved in shifts and transfers, and those matters which really I am not qualified to go any further into because I am not a professional educator involved with the administration of the schools, or personnel problems, or relocation problems, attendance figures, etc. We have people on our staff that do that for us.

"Q. You mentioned the gradual adjustment. Gradual adjustment on the part of whom and to what?

"A. On the part of the community.

"Q. You mentioned gradual change. The gradual change on the part of whom or what?

"A. Gradual change from the established custom and traditions of our community.

"Q. You mentioned the question of transfer. Do you have a present transfer system?

"A. Yes, sir.

"Q. That operates within an established administrative framework, does it not?

"A. Yes, sir.

"Q. And transfers are made for administrative reasons, are they not?

"A. Yes.

"Q. Then what transfer—if you rezone the city school system—you would have pupils assigned to schools and presumably you would have the same total number of [fol. 107] pupils that you would have whether it was integrated or segregated, wouldn't you, sir?

"A. I would think so."

* * * * * * *

"Q. Would you explain, sir, how transfers suddenly become a problem?

"A. Well, because under any plan that we would submit, we felt that there should be transfer policies under certain

hardship circumstances, and our feeling was that if we desegregated the schools, the hardship circumstances would be multiplied, and therefore be more transfer applications and more decisions.

"Q. You refer to—pardon me.

"A. That's all.

"Q. You refer to hardships, by the desegregation the hardship circumstances would be multiplied. You refer by that to the addition of permitting transfers based on race or color?

"A. Yes.

"Q. Then the only transfer problem arises by reason of the desire of the board to permit transfers to be made based on race or color; looking towards continuance of the segregated system as long as possible?

"A. That would be the policy that the board would lay down which would increase the number of transfers, but we felt that was more or less a part of any plan, that there would have to be transfer policies laid down, too.

"Q. And there again this is based—this feeling of the board that there should be provision for transfers based on race—this is attributable to the board's feeling with regard to the hostility of the community to this sort of [fol. 108] change; is that it?

"A. Not as much as to the effect that it might have upon the students. I would like to be clear on the matter that our primary concern is the education of our students, all of them. That is our prime concern.

Other factors enter into our decision, but our primary concern is the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstances which might be harmful.

"Q. You feel that it would be harmful to the students, to the white students to be permitted to go to school with Negro Americans?

"A. We felt it might be harmful to a certain number of them. We also felt it might be harmful to some of the colored students to go with white students if they didn't want to.

"Q. What was the basis of the feeling that this would be harmful to any students?

"A. Well, we get into a lot of factors there. The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways, and certainly not in school ways. And there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either one of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur.

[fol. 109] "Q. Then this was based on your feeling that for an American of one race to be placed—or, shall we say, ethnic or mixed ethnic group to be placed in a class room with another might result in harm to both of them?

"A. Might. Yes.

"Q. What kind of harm do you refer to?

"A. Oh, not necessarily physical harm, although that could occur, but we were more concerned with what you lawyers refer to, I believe, as—I heard it, but I can't think of it. It is a mental harm. I am afraid that's all I can say, a mental harm. A mental state.

"Q. Have you ever read any of the studies which show that it is harmful, that segregation is harmful both to the Negro and the white child and that it tends to give the white child a false sense of superiority and tends to give the Negro child a sense of inferiority?

"A. Yes, I have read statements to that effect.

"Q. You do not agree with that?

"A. I think it has its points. I don't agree with it wholeheartedly.

"Q. Are you aware of the statistics that possibly 90 per cent of the people of the world are colored peoples, people of ethnic groups other than the Caucasian?

"A. Well, I am not aware of the exact figures. I know the Caucasian is in the minority. You are talking about one race as opposed to five or six, or four or five others.

"Q. You mean by that you are attempting to distinguish the American Negro from other colored people like the Chinese and Indians?

"A. No, I mean that you are saying the Caucasian is in the minority and 90 per cent are colored. You are grouping under colored several other races besides the Negro. [fol. 110] "Q. Has this board ever considered the need, any need in the process of providing the education which it provides, for developing in the children in your school system an ability to get along with children and to understand children and people of other races and other ethnic groups?

"A. Yes, sir.

"Q. Do you have exchange students from time to time?

"A. Yes, sir.

"Q. Do you consider this harmful?

"A. No, sir.

"Q. To either the exchange students or to your students?

"A. No, sir.

"Q. Have you had Chinese students on exchange programs?

"A. Not to my knowledge. We may have had in the past, but not to my knowledge.

"Q. You limit your exchange students to people of Caucasian races?

"A. I believe so.

"Q. Then you feel that it is in accordance with the development of the democratic ideal in the United States to attempt to insulate the white children entirely from all other ethnic groups?"

Mr. Fowler: There is an objection on page 44 which is not now pressed.

(The reading of the deposition was continued.)

"By Mr. Williams:

"Q. Subject to the objection, I would appreciate it if you would answer that, Dr. Burkhart.

"A. Well, now, as I understand this question, you are asking me if I believe that it is beneficial to the white students to keep them isolated from the other races.

"Q. No, sir, I asked if it was your belief that it is in ac- [fol. 111] cordance with the democratic idea, a philosophy

I might add, of education in the United States of America to insulate white children from any contact or association with children of other ethnic groups?

"A. No.

"Q. But as a matter of fact, it is the policy of this board to attempt to so keep the white children from these contacts within the school and in its activities with other ethnic groups?

"A. Yes, sir.

"Q. And your teachers are assigned on this same basis, on the basis that no Negro teacher is or could be assigned to a white school in Knoxville?

"A. That's correct.

"Q. Are any white teachers assigned to any Negro school?

"A. That is correct?

"Q. They are?

"A. Are not.

"Q. Dr. Burkhart, has the City of Knoxville built any schools within the past five years?

"A. Yes, sir."

. . . . . .

"Q. Are you familiar with what schools have been built?

"A. Well, I probably would leave out one or two, but I am familiar with most of them.

"Q. I should ask—I am sorry. I didn't remember. You have just been on since '58?

"A. Yes.

"Q. Since you have been on the board, that would be all you should know about personally, wouldn't it?

"A. Yes. If I state this wrong, it is due to a faulty memory. I do not believe that we have built but one school since 1958 completely new in an area where there was no school. There is just about to be completed a junior high school for white children.

[fol. 112] "Q. Where is that located?

"A. Whittle Springs Junior High School.

"Q. Whittle Springs Junior High School. It is not quite completed?

"A. It is not quite completed.

"Q. When was it—

"A. Begun?

"Q. Yes, sir.

"A. About a year ago, I believe. Or maybe a little longer. It will be completed in time for the September term. It is almost completed.

"Q. It was begun about the spring or summer of 1959; is that correct?

"A. I believe so. I believe it it is about a year program. But we have put additions and remodeled extensively several schools since 1958.

Both Negro junior high schools have had large additions, one costing in the neighborhood of three-quarters of a million dollars; the other one a little less than that but not a great deal, maybe half a million or in that neighborhood.

We have put additions on at least three Negro elementary schools, large additions, in some cases; and in others just small additions.

"Q. What school?

"A. What school?

"Q. Yes.

"A. Maynard Elementary, we put a large addition onto. Cansler had an addition. Eastport had an addition. Sam Hill had an addition.

"Q. Do you have any idea as to what these additions cost?

"A. Well, that's just—

"Q. I will get that.

"A. We have the figures on that, but it is very, very high. I will tell you that.

"Q. Have there been any others?

"A. Other Negro schools?

[fol. 113] "Q. Any other Negro or white schools, any additions?

"A. Yes. There is an addition to Belle Morris School which was begun before this board came into office, but was completed after this board came into office, and which we accepted. And an addition to Claxton.

If I had a list of the schools, I could go right down them.

"Q. That's all right. I thought I would get this from you. I can probably get more complete information from Mr. Johnston.

"A. I probably left out one great big one but I can't think of it.

"Q. All of these have been done since you have been on the board. This is occasioned, partially, by reason of your being taken out of order, Dr. Burkhart.

Now, Dr. Burkhart, at least this transfer provision of your plan, you are familiar with the plan that the superintendent proposed?

"A. I think I am.

"Q. It was explained to the board?

"A. Oh, yes.

"Q. By the superintendent?

"A. We had copies of it. We were entirely familiar with it at the time.

"Q. How do you expect this transfer provision actually to work? Paragraph 6. Do you remember that? If you like, I will be glad—

"A. If I could have a little help, I would appreciate it.

"Q. Paragraph 6 is the paragraph I am referring to there.

"A. How do we expect it to work?

"Q. Yes, sir, I mean in terms of actual operation.

"A. You mean do we think it will be used very much? [fol. 114] "Q. No, sir. I want the administrative, how the administrative operation of it will work. Is the board familiar with that?

"A. Yes, I think so. I think I know how it will operate. I think that under conditions listed in paragraph 6a, in other words, 'When a white student would otherwise be required to attend a school previously serving colored students only,' this white student's parents or guardian would request in writing a transfer to Mr. Marable, our attendance and child—well, our supervisor for that particular category, of students and child personnel, would request that transfer in writing, and it would be granted, simply because it is already stated that being board policy.

And under the opposite situation, 'When a colored student would be required to attend a school previously serving white students only,' he would have the same—he or she would have the same privilege.

Or 'When a student would otherwise be required to at-

tend a school where the majority of students of that school or in his or her grade are of a different race,' other than his or hers, if desired he could request a transfer to where he would be in the majority.

"Q. Dr. Burkhart, how will a student know when he would otherwise be required to attend a school previously serving only colored students?

"A. Required to attend a school?

"Q. Yes.

"A. That is very simple. We have colored schools and we have white schools. If a white student—if in rezoning, which would be necessary under this plan to some extent, [fol. 115] because we would overcrowd some schools if we didn't and leave some with less students than they are able to handle, if he would be zoned to go to a school which the year before had been a colored school, and, of course, before integration would have been serving colored students only, then he knows he is going to have to go to Maynard School or to Cansler School or to Eastport or one of the others, he can request a transfer to a school where he has been going.

"Q. What I am asking is how does he know that?

"A. On the basis of the zone in which he falls.

"Q. All right, what notification does he receive of that zoning?

"A. All students, all pre-school students are informed as to which school they will go to, or at least the boundaries of the zone that they live in and what zone is served by which school.

"Q. They are informed ahead of admission time?

"A. Yes, sometimes, yes, sir.

"Q. By letter or card or something?

"A. I am sorry, I can't answer that. Either by that or by newspaper. I don't know, but they know.

"(Discussion was had off the record.)

"Q. Then you actually don't know then how a student would be notified as to what school he was to be zoned in?

"A. Not the complete mechanics as to how he would be notified, I do not.

"Q. This was not considered by the board in passing upon this plan so far as you know?

"A. Not as to how he would be notified. We just know that he will be.

[fol. 116] "Q. If he were allowed to go to the segregated school where he previously attended and then sign a little transfer slip there transfer to that school from some other school he had had never been to or seen, then so far as you know or the board knows, that could be within the operation of this transfer provision. There could be a method under which it might be operated?

"A. If it falls within our rules and regulations for transfers including these, yes.

"Q. Well, of course, this plan doesn't say anything about that. It just talks about the conditions of transfer.

The board hasn't made any regulations with regard to the child going to the school in which he is assigned and then there applying for a transfer?

"A. The board has regulations now which govern transfers.

"Q. Would those regulations—are those regulations still to be in effect under this plan?

"A. In effect under this plan with these supplementing, and, of course, superseding any which would conflict with these.

"Q. May we have a copy of those regulations and would you offer that as the next exhibit?

"A. Yes, sir."

Mr. Fowler: And Exhibit 11 has already been filed bearing the same number here today, the regulation as to transfer and assignment.

(The reading of the deposition was continued.)

[fol. 117] "By Mr. Williams:

"Q. Now under this plan if a Negro student wanted to transfer to a white school, that is, to adopt the words of the plan, if he wanted to transfer, if he would otherwise, if a Negro student would otherwise be required to attend a school previously serving only Negro students—the converse of subsection b of paragraph 6—if he in fact wanted to transfer to a white school, there is no provision in this plan which would permit that; is there, Dr. Burkhart?

"A. Now may I have that again?

"Q. In other words, this plan provides that when a colored student would otherwise be required to attend a white school, that is, what was previously a white school, he may transfer back to a Negro school. That is the intent of this plan, isn't it?

"A. Yes, sir.

"Q. Now if he is attending a school previously serving only people of his own race and he wants to attend a white school, he couldn't transfer under this plan?

"A. He wouldn't have to transfer under this plan. This plan would desegregate a white school in his zone. He would have the privilege of attending a white school in his zone.

"Q. This plan wouldn't desegregate every school in the city, would it?

"A. No, sir. But this plan, as I understand it, would allow, or would prohibit any colored student from being denied the privilege—a colored first grade student from being denied the privilege of entering a school in his zone purely on the basis of race.

"Q. Well, do you anticipate that any white students under this transfer provision will remain in schools, that have [fol. 118] formerly been Negro?

"A. Do I think they will want to?

"Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively?

"A. We doubt that they will.

"Q. As a matter of fact, none have remained in the City of Nashville, have they?

"A. I don't know. All I can do to keep up with the City of Knoxville.

"Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not?

"A. Yes, sir.

"Q. And if he applied for transfer out of his zone to a school which had been formerly serving white students only,

then his application would be denied under this plan, would it not, sir?

"A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted."

• • • • • • •

"Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph 'a' or 'c' of this plan?

"A. Yes, sir."

[fol. 119] The Court: Incidentally, is this the same language in the Nashville plan?

Mr. Fowler: Yes, sir.

The Court: Is this the identical language? Did not Judge McAllister have something to say about these transfers. Did he not say that language was all right after he heard the proof on both sides?

Mr. Fowler: That is right.

The Court: If I remember that decision, and I think that decision is very important in its bearing on this case, what Judge McAllister said, and Judge McAllister was speaking for the Sixth Circuit in a case from Nashville—of course, the Supreme Court of the United States has the last word, but the last word for this Court on this particular subject is our Sixth Circuit until the Supreme Court changes that wording, and that wording was written by the now Chief Judge McAllister, and it was a unanimous decision. You say it is identical?

Mr. Fowler: It is identical.

The Court: If it is identical, I remember Judge McAllister writing about it, he said it was all right, as I understand it.

• • • • • • •

"Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph 'a' or 'c' of this plan?

"A. Yes, sir.

[fol. 120] "Q. Without any consideration of other regulations?

"A. Yes, sir.

"Q. Do you anticipate that—is it going to be the policy of the board to make free transfers of Negroes from segregated schools, schools which were formerly segregated to white schools based on purely administrative reasons, that is, under your other regulations that you say you have?

"A. All I can tell you is that it will be the policy of the board to grant transfers under the regulations which are now established plus these regulations here, which supersede any regulations that are now established with which they are in conflict.

"Q. But insofar as race or color, insofar as racial segregation is concerned, these provisions, paragraphs 6a, b, and c, will constitute the only change from the regulations that you have now, will they not?

"A. Yes, sir.

"Q. So that in case of a transfer of a Negro student who sought to register in a white school, he would not qualify under this, and he would therefore not qualify under your regular provisions because under your regular provisions it's been your policy not to grant administrative transfers in order to integrate the schools; is that correct, sir?

"A. That is correct."

Mr. Fowler: That is another question of a type to which I object, your Honor.

"Q. That will remain your policy except for this change?

"A. That is correct, and will apply likewise to white students.

(The reading of the deposition was continued.)

[fol. 121] "Q. I understand that the board is now providing transportation for white students who were formerly enrolled in Mountain View School prior to its close to Park Lowry School; is that correct?

"A. That is correct.

"Q. Providing bus transportation?

"A. Prior to its close.

"Q. Will that policy continue?

"A. No, sir.

"Q. It is not being continued?

"A. That was for the remainder of this school year.

"Q. Then have there been prior proposals to integrate Mountain View School, I mean not to integrate, to change and convert Mountain View from a white to a Negro school?

"A. Not to my knowledge. Not while I was on the board. The matter did not—

"Q. The matter did not come up?

"A. —come up. We simply closed Mountain View School first. It was closed for several months.

"Q. Why was Mountain View School closed?

"A. Because of the few number of pupils, because we couldn't justify the expense involved in keeping the school open with the number of pupils served."

• • • • • • •

"Q. You are referring to the white pupils?

"A. Yes.

"Q. Negro pupils residing in that area could have adequately filled and probably overflowed the school?

"A. Probably.

"Q. So the school was closed in order to retain segregation as of that time; is that correct or not?

[fol. 122] "A. The school was closed because there were not an adequate number of students, white students to fill it.

"Q. But had it not been for the policy of segregation, there would have been an adequate number of pupils in the area from which that school draws to fill it?

"A. There probably would. I am not sure. There probably would. If we had had and if we had operated under a desegregated plan—

"Q. Yes, sir.

"A. —we could have probably filled it with mixed students.

"Q. And it would have been about half and half?

"A. I don't know.

"Q. You say the cost of operation of the school was prohibitive for the number of students you had there, the white students?

"A. Yes, sir.

"Q. You had about 180, didn't you?

"A. I guess. I don't have the figures.

"Q. Are you aware—

"Mr. Fowler: I believe Mr. Johnston said 130.
"Mr. Williams: Was it 130?
"Mr. Fowler: Mountain View.
"Mr. Johnston: That was the estimate that I gave.

"By Mr. Williams:

"Q. Are you aware that there will not be a considerably larger number of students there when reopened as a Negro school?

"A. I don't know how many Negro students will be involved when we open it in September.

"Q. You mean this was not considered when it was considered to be reopened as a Negro school?

[fol. 123] "A. Yes, this was considered. The main factors, however, as I recall, that were considered was the fact that the other schools in the area were overcrowded, and it was a means of relieving the other elementary schools in the area.

"Q. By the other schools, you are referring to Green School and Eastport?

"A. And Eastport.

"Q. Which are receiving Negro pupils from areas in which, many areas in which there are white schools which could take them?

"A. Oh, I suppose. I am not sure.

"Q. If all the schools were integrated, this problem could possibly have been solved without operating Mountain View at under capacity and increased expense; isn't that correct, sir?

"A. I can't a[illegible] that question. It is possible, but I am sorry I cannot answer it.

"Q. You will concede that it is possible?

"A. It is possible. Many things are possible.

"Q. The board did not consider at that time the possibility of alleviating this situation by simply integrating the school?

"A. No, sir.

"Q. Has the board ever considered the alleviation of any such administrative problem as that by integrating the schools?

"A. No, sir.

"Q. The board considered administrative problems only insofar as they may be advanced as an impediment to desegregation; is that correct, sir?

"A. No, sir.

"Q. Will you point out to me—

"A. The board considers that there are problems and [fol. 124] then that there are problems, and that some problems are much greater than other problems, and that we recognize and accept some problems as being necessary to live with in an effort to keep from creating larger ones.

"Q. Then the board considers that this community acceptance problem is really the biggest thing that they have to deal with insofar as desegregation of schools is concerned and the only real factor?

"A. It considered it is one of the larger of the problems that would be involved.

"Q. And consequently it hasn't considered the administrative problems which might be alleviated by integrating the schools?

"A. Yes, sir, it has considered them, maybe not always favorably but it has considered them.

"Q. Hasn't considered them favorably then. I see.

The board also or rather the school system for which the board sets the policy, also transports pupils from New Hope School, and I believe Edgehill right past Brownlow School to Maynard School, does it not?

"A. The board transports some students from an area known as the Muck Town area where the Edgewood School, I believe is the name, was formerly located, and then torn down. Transports a few students from there to Maynard.

"Q. That, as a matter of fact, that school is in the vicinity of a white school, is it not?

"A. Which school?

"Q. Brownlow? Aren't these Negro students in the vicinity of Brownlow School?

"A. Yes, sir.

"Q. And go right by there by bus across town to May- [fol. 125] nard?

"A. I don't know the bus route. It goes fairly close, I imagine.

"Q. The board pays for this?

"A. Yes, sir.

"Q. Do you have any idea how much the board spends annually on their transportation?

"A. No, sir.

"Q. This is another situation which might be eliminated if the schools were integrated?

"A. It might be. If those students elected to go to Brownlow, it might be they would have their option.

"Q. As a matter of fact, this situation with the children being transported, the Negro children being transported from Muck Town, as you said, to Maynard and the white children now being transported from Mountain View, or last year transported from Mountain View to Park Lowry, this constitutes the only expenditure that the school board makes for transportation of pupils, does it not?

"A. Insofar as I know, it does.

"Q. So that the board might well eliminate any transportation problem entirely by integration of the schools?

"A. Yes.

"Q. Is there any other problem which has come up that the board has considered in connection with integration or desegregation, Dr. Burkhart?

"A. Not to my knowledge."

Mr. Williams: I believe that's all, Dr. Burkhart.

[fol. 126]

EXCERPTS FROM DEPOSITION OF ROBERT B. RAY

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"ROBERT B. RAY being first duly sworn, was examined and deposed as follows:

"Direct examination.

(The deposition was read by Mr. Williams.)

* * * * * * *

[fol. 161] "By Mr. Williams:

"Q. If you prefer not to answer that question, I will withdraw the question. Do you prefer not to answer that question?

"A. Well, I do not think that we have to have a Utopian

society, and by Utopian I mean a society that is so ideal that we all know it will never come to pass because we have an idea when you talk about Utopia that is something there ain't nothing of and there will never be none of it.

I don't think it will be that long until we can have some racial equality, but it is going to take a little time. These things don't happen overnight.

"Q. You have a summer school here for white children, do you not?

"A. That's correct.

[fol. 162] "Q. You don't have a summer school for Negro children?

"A. That is correct. And I myself have made inquiry every year as to why we don't have a Negro summer school. Each year I am told by the superintendent and the staff there is no demand for it. And I say, 'Well, is there any demand for Negro students to be admitted to the white summer school?' And the answer is, 'No, there is no demand for that either.'

"Q. Under your plan, of course, no one would be eligible for—does this plan mean that a Negro could be eligible for admission to the summer school only for the first grade, grade by grade and year by year?

"A. This plan, as I read it, says effective with the beginning of the next school year, this September, racial segregation in grade one of the Knoxville schools is discontinued.

"Q. I have a copy of it.

"A. My understanding of that plan is the plan means just what it says. Effective this year there will be no more segregation on the basis of race, with the exception, and this is not segregation, with the exception as the pupil requests that he not go to school in a school where the majority of the students are not of his race, that he can transfer to another school.

"Q. Now—

"A. My answer to your question is that it would be my understanding that a child in the first grade this next year who for some reason didn't learn some subject as well as he should have, could go to the summer school, if there were a summer school for first graders, on an unsegregated basis. That is my understanding of what that plan would mean.

[fol. 163] "Q. This summer school is available to white children throughout the city?

"A. That's right.

"Q. So that Negro children who are above the first grade would be, for next summer, and every school year ascending each grade, would be denied—

"A. That is correct.

"Q. —the privilege of going to summer school?

"A. That is correct.

"Q. The same thing is true as to the technical high school, is that correct?

"A. Fulton High School?

"Q. Yes, sir.

"A. It is my understanding that under this proposed plan there would be no integration of the high school until about eight years from now, or nine years.

"Q. There would be no integration of this occupational, this Van Gilder occupational school over in Moses School?

"A. No, not until the integration plan reaches up to the grade group that that school operates, which I think starts with the seventh grade.

"Q. Directing your attention to paragraph 6 of this plan which contains transfer provision, do you have any information as to how this transfer provision will actually operate?

"A. None other than that when we proposed them we assumed that we would operate it on the same basis that Professor Oliver operates his over at Nashville.

"Q. Did you know that the way Mr. Oliver is operating in Nashville that the child, the first grade child receives no notification as to what school he is to attend? He just at-[fol. 164] tends a school which as a matter of history the Negroes or whites have been attending, and transfer is automatically made out for him there unless he requests to go affirmatively to the school which allegedly he is assigned to. Did you know—

"A. No, sir, I didn't.

"Q. —the Nashville plan operates that way?

"A. No. I understood maybe erroneously, but I understand Professor Oliver's plan was that every school in the city had a zone line drawn around it, and that every child

went to the nearest school, and every child was notified where his school was, and that if that school was a school that had previously been one where the majority of the students there were not of his race he could go there if he wanted to, but if he did not want to go to school in a school where most of the people were of another race, he could ask for a transfer and he would go to—

"Q. Go to the school to which he was assigned in the zone?

"A. If Professor Oliver is operating his school system on any basis other than that, why I didn't know it.

"Q. Then it is your understanding of this plan that the zones would be drawn and the student would go to the school to which he was assigned; is that correct?

"A. That's right.

"Q. Without regard to race or color?

"A. That's exactly right.

"Q. And there he would be apprised in advance of where that school was, and that then his parents would sign a request for transfer?

"A. That's right.

"Q. Transfer him back to whatever school he wanted to go?

"A. He wouldn't be transferred unless the parents and [fol. 165] he both wanted it. We think the child would have some interest in it, too. Of course, we would be primarily interested in what the parents wanted.

That is my understanding, and I think that is the understanding this board had when they adopted this plan.

"Q. When you voted for that provision you had that understanding?

"A. I voted against it. But that was my understanding of what it was, yes, sir. I think that is what the other board members thought.

"Q. I think Mr. Oliver, when he was here in Knoxville, tried to refer to the way it was operating down there and as being one of the good features of the way he was operating, the children didn't have to go to the white school and be embarrassed; he could go to his same school he would have attended anyway and the principal could transfer him out without any trouble, transfer him without any

trouble. So that occasions my surprise. I think this was subsequent to the approval of this plan though.

"A. I have never talked to Mr. Oliver here in Knoxville. The only time I talked to Mr. Oliver was in Nashville and I didn't understand that they were using your plan to perpetuate segregation over there.

"Q. Do you understand under this transfer provision of the plan that while a colored student who has been attending a colored school can transfer out of a white school back to a colored school, or in the case of a white student he can transfer out of a formerly colored school back to a [fol. 166] white school, the reverse is not true—that a colored student cannot transfer out of a school which was formerly colored and into a white school, or vice versa?

"A. My understanding is that the plan means just what it says. That every school will be zoned, and everybody who lives within the zone line around that school will go to that school, regardless of whether they are black or white; and if for one of the reasons listed under sections a, b, and c under paragraph 6, if the child feels that he is entitled to a transfer he can get it.

And I believe your problem is—now check me if I am wrong, but you are asking me what would happen to a colored student who lives within the boundary of a colored school, one that has previously been all colored; and that may now have some white students, but still is predominantly a colored school?

"Q. Yes, sir.

"A. Wanting to go to a white school. I think the only way he can do it is move into another zone.

"Q. Do you recognize that this unevenness, or shall we say, inequality of operation which you have very clearly pointed out tends to perpetuate the segregated condition of the school system?

"A. Well, it is a question of the chicken and the egg. You say it tends to perpetuate—do I think it tends to perpetuate—

"Q. I asked if you recognize—

"A. I recognize that if people segregate themselves into a given neighborhood where the great majority of the people in that neighborhood are of a certain race, obviously

the great majority of the people in that school is going to be of that race.

[fol. 167] "Q. You don't intend to infer that the Negroes voluntarily segregate themselves residentially in this area, do you, Mr. Ray? Let me put that another way.

"A. Let me put it this way. Until the Supreme Court declared that restrictive covenants ain't no good no more, of course, they lived wherever they could get to live. That results in them living in the same place.

Those covenants are no longer valid. And I know here in the City of Knoxville many neighborhoods which had been all white are now 50-50 or 30-60, 30-70, or 40-60, something like that.

It is changing. It is a changing world, as you suggested.

"Q. But isn't it true that as soon as the Negroes move into the older residential areas that the whites rapidly, there is a rapid exodus on the part of the whites out to the suburban area?

"A. Well, I think generally that is true, but I don't think that is a school problem as such. It is a problem, but it is not a school problem.

"Q. I simply ask that in connection with your statement that the Negroes segregate themselves.

As a matter of fact, there are unwritten restrictions on the part of, in many, many neighborhoods in this area with regard to the purchase of property or racial barriers?

"A. Yes, sir, there are unwritten restrictions on a whole lot of things. That is one of the things that makes this whole problem so difficult are other than school restrictions.

[fol. 168] "Q. This inequality of operation that I suggested with respect to the operation of paragraph 6a, b and c of this plan does tend to perpetuate segregation, does it not, sir?

"A. Well, I suppose I will have to answer yes, segregation is perpetuated thereby. But I don't know of any other system that you could use unless you want to pass some kind of anti-segregation law to require people that live in the segregated area to go to school somewhere else. And that is just not the law.

"Q. Under your plan this provision of paragraph 6a, b, and c, will constitute automatic basis for transfer? All that a student has to show is that he meets these conditions and then he will be automatically entitled to transfer administratively more or less?

"A. If he requests it.

"Q. Yes.

"A. If he requests it.

* * * * * * *

[fol. 172]

EXCERPTS FROM DEPOSITION OF DR. CHARLES R. MOFFETT

"DR. CHARLES R. MOFFETT being first duly sworn, was examined and deposed as follows:

"Direct examination.

"By Mr. Williams:

"Q. Will you state your name, please, sir.

"A. Charles R. Moffett.

"Q. I believe it is Dr. Moffett, is it not?

"A. Yes, sir.

[fol. 173] "Q. Dr. Moffett, are you a resident of Knoxville?

"A. Yes, sir.

"Q. How long have you been such?

"A. Since about 1953, 1954.

"Q. What is your occupation, sir?

"A. I am director of the evening college at the University of Tennessee.

"Q. Are you a member of the school board of Knoxville?

"A. Yes, sir.

"Q. How long have you been a member?

"A. I was elected in the fall of 1958, and began serving—I beg your pardon. It was '57, and began serving January 1, 1958.

* * * * * * *

[fol. 202]

* * * * * * *

"Q. What do you understand this transfer provision to

mean in item paragraph 6 of the plan which the board proposed, Dr. Moffett?

"A. Plan 9, sir?

"Q. Yes, sir.

"A. As I understand it, Mr. Williams, it involves children who—which item is it?

"Q. It is paragraph 6 a, b, and c.

"A. Well, as I understand it, in general without reading it again, if a child of either race who is located in and zoned in a school finds himself or herself in a majority of the student population, or majority or minority of a classroom situation, that that child's parents and that child would have the right to petition for transfer for that child.

[fol. 203] "Mr. Fowler: You said find themselves in a majority?

"The Witness: Or minority.

"By Mr. Williams:

"Q. The plan actually states that these shall be as a matter of board policy automatic valid conditions for transfer.

'a. When a white student would otherwise be required to attend a school previously serving colored students only.

'b. When a colored student would otherwise be required to attend a school previously serving white students only.

'c. When a student would otherwise be required to attend a school where the majority of students of that school of in his or her grade are of a different race.'

"A. Yes, sir. Assuming that the first is correct, I should correct that to state that as I understood the plan that when he is a minority he would have this opportunity where it worked a hardship on him.

"Q. He is in the minority of a school or class room where he is located?

"A. Yes, sir. And I should state for the record that these other two are as a matter of fact in terms of transfers and that is if he were compelled to attend a school that was previously all colored or all white.

"Q. In other words, you are stating that the effect of these provisions is to create a right to transfer on a ground [fol. 204] of racial minority in the school or in the class room?

"A. If he was zoned to a place where he was in a minority and he—

"Q. Racially speaking?

"A. Well, yes, sir, this refers to color. They would be given the opportunity with his family to transfer him if he so desired.

"Q. What notification do you understand that a child will receive as to what school he is to attend under this plan?

"A. As I understand it, Mr. Williams, if the plan were accepted, and if they were zoned properly, that the child would be—it would be indicated to the child prior to the school year, and I don't know the established date, but I think the administration has talked in terms of two to four to six weeks, somewhere in that period, that he would be notified that this was the school where he was expected to attend.

"Q. He would have reasonable notice, written notice, that this was the school which he was expected to attend?

"A. I don't know whether written or not. It might be by public publication, but that is what I understood.

"Q. Just publish it in the newspaper without knowing whether it actually came to their attention?

"A. I don't recall the media they are going to use.

"Q. Was this discussed at all?

"A. Yes, sir.

"Q. By the board?

"A. Yes, sir. I don't think—

"Q. Did the board reach any conclusion about that?

"A. No, sir. In terms of zone or the other administrative matters, left up to the administration.

[fol. 205] "Q. The board is just leaving this up to the superintendent?

"A. To bring back to the board for approval.

* * * * * * *

"By Mr. Williams:

"Q. Then why then, Dr. Moffett, did the board not include the provision or provisions providing as a valid condition, as a specific valid condition for transfer when a white student would otherwise be required to attend a school previously serving white students only?

"A. I don't know.

"Q. You did not consider that, however?

"A. No, sir. I have never heard it discussed.

"Q. But you do concede that these three conditions listed in paragraph 6 of your plan are definitely based on racial factors?

"A. They involve schools in the zones where they are located which we didn't build. They were there.

"Q. You will concede they refer to white and colored schools, and permitting a white student to transfer—

"A. Yes, sir, I think it states it.

"Q. He may transfer back to a predominantly white school?

"A. I think it states it.

"Q. And a Negro may transfer back to a predominantly Negro school?

"A. Yes, sir, I think that states that.

"Q. These transfer provisions, therefore, on their face tend to perpetuate segregation insofar as they are availed of by the students; is that correct, or their parents?

"A. At least give the opportunity.

"Q. They give an opportunity to prolong the segregated system; is that correct, sir? I think you have stated that [fol. 206] that is correct.

"A. I think your statement is a fact that would stand on its own merit.

"Q. There are no express conditions for transfer in here which permit a student to avail himself of an opportunity to integrate the schools? That is, transfer out of a school which was predominantly of his own race into a school which was predominantly of another race?

• • • • • • •

"A. Mr. Williams, as I would interpret that, that in terms of the statement on this that these are some of the

valid conditions, that there are other conditions the child would be given consideration for request for transfer.

"Q. What other conditions?

"A. That would be a condition you just talked about.

"Q. Is that in this plan?

"A. No, sir. I say there might be many, many other conditions that are not stated here that are present board policies about transfer.

"Q. Do your present board policies about transfer permit a Negro student to transfer into a white school?

"A. No, sir.

"Q. Do they permit a white student to transfer into a Negro school?

"A. No, sir.

"Q. Thus your present policy remains unchanged except insofar as this plan changes it, does it not?

"A. Our present board policy—I do know, for instance, allows a child, a white child to attend another white school, as you were stating.

"Q. Dr. Moffett, let's be fair about this thing now.

"A. Yes, sir.

[fol. 207] "Q. Your present board policy remains unchanged except insofar as it is modified by this plan?

"A. That is correct, yes, sir.

"Q. I ask you again, will you direct my attention to some provision in either this plan or in your present board policy on transfers which permits a white student to transfer into a Negro school or a Negro student to transfer into a white school?

"A. Sir, on the basis of these, some of these valid conditions, and they are all contingent upon paragraph 5, of this plan, I assume that there are other conditions whereby they can transfer, even though they might not be pronounced and placed down here. If you read section 5.

"Q. What are those conditions?

"A. Well, for instance, we have students now who might be at East High School and might want to take completely technical training program. I do know this board has provisions for transferring him, and it is not stated.

"Q. That is based on your present transfer policy?

"A. Yes, sir.

"Q. That you already have?

"A. Yes, sir.

"Q. But under your present transfer policy, you are operating under a system of segregation, are you not?

"A. That is correct; yes, sir.

"Q. And you would not permit a white child or Negro child to transfer to a school in order to integrate that school or in order to be in an integrated school under your present policy?

"A. I don't know.

[fol. 208] "Q. You don't know whether you are operating under a system of segregation now or not?

"A. That wasn't what you asked me, to an integrated school. I assume in all these questions where we have adopted this plan and drawn a radius, circles around schools, that we are desegregating schools and not integrating schools.

"Q. I am not talking about this plan now. I am asking you whether under your present policy you are operating under a system of racial segregation?

"A. I answered that yes, sir.

"Q. Racial segregation?

"A. Segregation.

"Q. So there could be no transfer within an assigned reason that a pupil wanted to attend an integrated school under your present system of transfer, could there, sir?

"Mr. Fowler: There are no integrated schools under the present system.

"By Mr. Williams:

"Q. Will you answer my question, sir?

"A. I can't answer it. We don't have any.

"Q. So there could be no transfer based on an assigned reason of a desire to integrate now?

"A. We do not have integrated schools at the present time. So I can't answer the question. I don't know.

"Q. You know that you do not permit integration in your schools at present, do you not?

"A. Yes, sir.

"Q. That is your policy.

"A. I know that.

"Q. Yes, sir. That answers the question, does it not?

[fol. 209] "Mr. Fowler: The question was answered by statements in the answer filed by the defendants.

"By Mr. Williams:

"Q. You decline to give me further answer to the question, Dr. Moffett?

"A. I see no reason to.

"Q. But you cannot direct me to any provision of this plan or of your present transfer policy which this plan modified which provides that a student shall have as a valid condition to support a request for transfer that he would otherwise be required to attend a school previously serving white students only?

"A. Except for the one I stated, and then I know—

"Q. What one are you stating?

"A. Where a white child is in a local school, a community school, and then requests the opportunity to attend a technical school which is not offered in there. He is going from a white school to a white school, and transfers are usually on his abilities granted.

"Q. Are you stating then that it is your understanding as a member of the board that under this plan a Negro student at Austin High School who wanted to attend a course of training at Fulton High School immediately after this plan went into effect—

"A. No, sir.

"Q. —could receive a transfer?

"A. No, sir. I thought you were talking about our present plan. No, sir.

"Q. Then you are not referring me to any provision expressly set out by the board which would permit a child to transfer out of a school previously serving people of [fol. 210] his own race into a school serving predominantly people of another race?

"A. No, sir.

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[fol. 260] Mr. Fowler: Now, I read the deposition of Mr. Marable. This is the deposition of R. Frank Marable, starting on page 2.

EXCERPTS FROM DEPOSITION OF R. FRANK MARABLE

"R. FRANK MARABLE being first duly sworn, was examined and deposed as follows:

"Direct examination.

"By Mr. Cowan:

"Q. This is Mr. R. Frank Marable?
"A. Yes, sir.

• • • • • • •

"Q. What is your present employment?
"A. Supervisor of child personnel.

• • • • • • •

[fol. 261] "Q. You also handled transfers?
"A. Yes, sir.

• • • • • • •

"Q. As to school population, what is the Negro population and the white?

"A. It runs a little under 5,000 for Negro, and about 17,000 to 18,000 for white.

"Q. Is it your opinion, or do you have any facts, or studies to show that there has been an increase of Negro school population since you have been supervisor of child personnel department?

"A. From the superintendent's annual report—you have a copy of that for last year—

"Q. That's right.

"A. —it was about a ratio of 20 last year, about 20 per cent Negro.

"Q. Did you help make up that report?

"A. Yes, sir, it is done under my supervision. Finally it goes from me, yes.

"Q. So you know of your own personal knowledge?

"A. Yes.

"Q. That there has been an increase. Has that increase been continuing steadily year by year?

"A. Been about one per cent a year for some several years.

"Q. Have you taken any school census lately or at any time?

"A. We took the last one in '56. We took it under state law every four years, and the last one—the Legislature cut that out. 1956 is the last we took.

[fol. 262] "Q. Do you take pre-school census every year?

"A. Yes, sir, we attempt to.

• • • • • • •

"Q. In other words, there have been no changes in the zoning maps or school districts since you have been employed—

"A. That's right.

"Q. —by the school board?

"A. Yes, sir.

"Q. And you are making a re-zoning map now as to what?

"A. As to what it is going to be when we are desegregated, all schools alike.

"Q. Is that map confined just to the Negro elementary and the white elementary schools?

"A. It is just confined to all elementary schools, yes, sir.

• • • • • • •

"Q. That being so, Mr. Marable, since you already have these two separate zones, to work out one zone wouldn't be too difficult, would it?

"A. Oh, we think we have done it. You will get that map.

"Q. In other words, it would be easier to take the population, school population, around a particular school without regard to race than to try to reach out say to the one end of the city to bring Negroes in a certain zone?

"A. No, we think we have done that. We have attempted to work out a zone with that school like we did any other school. In other words, they will all be alike. Wouldn't be any difference, colored, black or white, just a zone. [fol. 263] Green, like Park Lowery, would have a zone, which they didn't have. There would be no difference.

"Q. That was my question. That is easier to work out a zone for that?

"A. They never ask me what is easier. I just do it if they tell me to do.

"Q. It is not too difficult?

"A. Any time you work up a zone for schools is difficult because so many things come into it.

"Q. I think you have answered my question. That if you take a school population around a particular school, you know what you have to work on, instead of having to work on a population not only around a school but go outside that area to bring in school populations.

"A. We know that way that we haven't required anybody to go to this school that lives a mile and a half over there, I don't think.

"Q. Mr. Marable, explain what is your present transfer policy.

"A. Well, sir, say we have a request for transfer. If a parent wants a transfer for a child, in quite a number of cases it is easy. Say if a child had been at Park Lowery all the year—

"Q. That is a white school?

"A. Yes, sir, either school, this applies exactly the same to both races. Only that heretofore a Negro boy could not apply to go to a white school; he could apply to go to any other Negro school. A white boy could not apply to go to a Negro school; but he could apply to go to any other white school. Now the only difference I see now is that—

"Q. Talking about the present plan. We will come to that new plan.

"A. Okay, and then what happens, if the child if the [fol. 264] parent lives in the district all the year, and along about February they move to some other part of town, they can apply to remain in that school the rest of the year, because they want to finish the year there. I guess you want more or less a detail of how to do it.

"Q. Go ahead. Yes, sir.

"A. When he applies, he applies to the principal.

"Q. Of what school?

"A. Of the school he is in. To be transferred to stay here instead of going to another school.

Then the principal sends it to me, and when they come to me and make their application, sometimes they make application to the school and it comes over—

"Q. Pardon me. This question: When you say we are talking about the parent of the child, or the child himself? Does he personally come before you or is it the principal?

"A. The parent does, not the child. The parent does, of course. When they come in here, I investigate why. In that connection it is easy if he has been a satisfactory pupil. I mean because that's all there is to it. If he wants to transfer to some other school and tells his principal. Some of them come to me and we tell the principal.

When they come in here and I find out why it is wanted, I have to investigate it from every angle to see that the school he wants to go to is not loaded. I have enrollments. I know about that pretty well, and I contact the principal of his former school and see what his record has been, see if he thinks it is all right, a good thing, because he knows the child better than I do.

[fol. 265] Then I contact the principal of the school he wants to go to and tell them if they have no objection, if that school is not loaded, that I may send him there. Then I have got the agreement of both principals.

Then I consider the family to see why, and if they have a valid reason, I grant the transfer.

If they just say Johnny thinks he wants to go to that other school, I say no because that is not a valid reason.

All of them are seriously considered, and most of them are granted if they have valid reasons. That is about it, briefly.

"Q. It is purely an administrative matter?

"A. Yes.

"Q. It is not a board policy?

"A. No, the board leaves that up to me. Once in a while, I get into one I ask some advice on, but normally it is up to me to do that.

"Q. Do you have any written rules or regulations as to transfers?

"A. Not specifically. I think in the board rulings there may be a paragraph on it as to some reasons. But it couldn't go into detail because there are too many things

to be considered. You have got to know the administration of that school. You have got to know that the school is not overloaded. Just got to know so many things they couldn't put it down.

"Q. So far as you know the board has not set up any policy or rules and regulations in regard to transfer?

"A. Yes, there are. But I couldn't tell you what they read to save my life.

[fol. 266] "Q. You couldn't tell what bulletins they are or what?

"A. No. I don't know offhand. I just know I have handled it so many years on my own, and so far I haven't stuck my neck out on it.

"Q. Primarily a child is expected to go to school in his own respective residence zone?

"A. That's right.

"Q. And if he wants to get out of any zone, he has to come to you for some valid reason?

"A. Yes, that's right.

"Q. What about special transfers? Do you have any that fall in the category of special transfer?

"A. They all are.

"Q. Explain to me the difference between special transfers and general transfers.

"A. General transfers. There is no general transfer so far as my department is concerned.

As I said a while ago, if the supervisor or superintendent or board want to move a class, I don't enter into that at all. I only handle special transfers, and each case is individual. That has to be handled that way. Could not have a rule.

"Q. Say a Negro child living in Eastport School district, a Negro school district, wanted to transfer to Cansler, Cansler School, and in the northwest section, while Eastport is in the east district, which would be out of his zone, under what circumstances and what valid reasons would he have for transfer that you would approve?

"A. Now that is what I have told you. There can be no iron-bound rule on it. Each case is individual. It must be handled that way. No other way to handle it.

[fol. 267] Let me see, for instance, I can give you a valid reason. Suppose the child's mother taught at Cansler. We

have some like that. She wants the child there with her. She has nowhere to leave it. If Cansler had the room, and the principal agreed to it, that's it.

"Q. Primarily are you saying that transfers from one zone over to another zone are made to take care of hardship cases?

"A. That's right. Yes. Not particularly hardship. Sometimes it is a matter of convenience. But hardship cases and convenience. Other factors.

"Q. This new plan—the grade a year plan—you are working on now called Plan No. 9—

"Mr. Fowler: A copy was filed with our report to the Court recommending the plan.

"By Mr. Cowan:

"Q. You are familiar with this plan now?

"A. Yes, sir.

"Q. It was submitted to the Court by the board?

"A. Yes, sir.

"Q. You are working on that now, are you?

"A. I don't have much to say about it, but I am in the staff meetings, yes. That is rather out of my line, too.

"Q. Items 4, 5 and 6 starting with—well, the whole plan involves re-districting and transfer provisions, does it not?

"A. It won't change the transfer provisions a great deal. Only the color line will just be disregarded. That is the only change I see in the transfer.

[fol. 268] "Q. Explain in your own words just how this transfer plan will work.

"A. It will work just exactly, so far as I am concerned, if I am delegated to continue, it will work just exactly like I have done it fo. 23 years.

The only difference is now that a Negro child can apply for transfer to a white school where before he could not, and vice versa. And so far as I am concerned, it will be handled just exactly like it was when he applied for one to his own race.

"Q. I ask you this, Mr. Marable: Say if there is a white child, under the new plan, if there is a white child living in the Eastport School district, which is a Negro school

district, on the east side, and wanted to transfer to Park Lowery elementary school, which now is a so-called white district, would he be allowed to do it?

"A. Well, as I stated a minute ago, he would have that privilege, and if it came to me, it would get serious consideration just exactly the same I have done it before now only I would forget that he was colored and the school was white. It wouldn't be—

"Q. Let's take a Negro child living in the Park Lowery School district which is a white school district and wanted to transfer to Eastport or Green which are Negro school districts. He would be allowed to do it under this plan, would he not?

"A. The very same way except we would forget he is Negro or a white child. If a white child wants to transfer to Green and applies for a transfer, he will get the same consideration. Only I just forget it is Negro and white.

. . . . . .

[fol. 269] "By Mr. Cowan:

"Q. You will be the one that will be executing it, will you not?

"A. If I am, of course, I will act under orders of the board. If I get no new orders, I will handle it exactly as I have all these years. These things, these 3, a, b, c, as I see it, is just an addition that has never been necessary before, because no white child or Negro child would apply to a school of another race. That is just three additional reasons on top of all the hundreds that we have had all these years, the way I see it."

. . . . . .

[fol. 326]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—August 19, 1960

This suit was filed by a number of negro children and their parents or guardians against the Members of the Board of Education of the City of Knoxville, namely, John H. Burkhart, Robert B. Ray, Roy E. Linville, Charles R. Moffett and Mrs. Gilmer H. Keith, and also the Board of Education of the City of Knoxville, the School Superintendent and the persons who were either actual principals or acting principals of East High School, Park Junior High School, Mountain View Elementary School and Fulton High School in Knoxville, Tennessee, the Supervisor of Child Personnel Department, said defendants being the administrative officers having general supervision and control of the public schools of Knoxville, asking for an injunction restraining defendants from operating a compulsory racially segregated school system in Knoxville and for a declaratory judgment, declaring the rights of plaintiff school children to be admitted to the public schools of Knoxville on a racially unsegregated basis nd without discrimination on account of race or color.

The defendants by answer admitted that the public schools were operated on a segregated basis, as had been the practice and custom in the Knoxville area since 1870.

The answer asserted that "Two duties of these defendants, have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a carful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged the responsibilities of their offices in the only way that a [fol. 327] proper reconciliation of conflicting allegiances has permitted. . . ."

In short, the position of the Members of the School Board was that the interest of the community demanded postponement of desegregation until a plan could be perfected that would fit the needs of the community.

The suit arises under the Constitution of the United States and seeks the enforcement of rights guaranteed by the Fourteenth Amendment. Jurisdiction is derived from Title 28 U. S. C., Sec. 1343. The Court has jurisdiction of the parties and the subject matter. Title 28 U. S. C. 1331, 2201, 2202.

The action was filed as a class action under Rule 23(a) (3) of the Federal Rules of Civil Procedure.

The parties stipulated many facts, many of which are included below in this memorandum opinion.

Plaintiffs are negroes and are citizens of the United States, State of Tennessee and are residents of and domiciled in the City of Knoxville, Knox County, Eastern Division of Tennessee. Adult plaintiffs, not applicants, are either parents or guardians of the infant plaintiffs who are applicants.

All infant plaintiffs are attending public schools operated by the City of Knoxville, except that infant plaintiffs, Blake, Robinson, Jr., Riddle and Thompson, graduated from Austin High School on May 31, 1960.

Defendant, Board of Education, operates the public elementary and secondary schools, including those now designated as Mountain View Elementary, Park Junior High, East High and Fulton High Schools, exclusively for the education and use of white children residing in the City of Knoxville. These schools are attended exclusively by white children and admittance thereto was denied to the infant [fol. 328] plaintiffs and other negro children similarly situated who reside in the areas proximately surrounding said schools, solely because of their race or color. The defendant, Board of Education, maintains and enforces a policy and practice of compulsory racial segregation throughout the Knoxville School System.

Fulton High School, in addition to providing the usual high school courses, affords adequate facilities to provide technical and vocational instruction on a modern basis by

grades. It is used by white children residing in the City of Knoxville, Tennessee who desire and are qualified to take said technical and vocational instruction, irrespective of their place of residence in the City of Knoxville; but the facilities afforded by Fulton High School are denied by defendants to infant plaintiffs who desire instruction, and other negro children similarly situated, residing in the City of Knoxville, irrespective of their place of residence in the City of Knoxville, solely on account of their race or color.

The School System of Knoxville consists of 40 schools, total enrollment of 22,448 students, of whom 4,786 are negro students and 17,662 are white students, as at the close of school June, 1960. On that day, the Knoxville School System employed a total of 879 principals and teachers, 712 of whom are white persons and 167 are negroes.

The enrollment in the first grade of the Knoxville Public School System was approximately 2,314 students, and 2,500 are anticipated in the first grade for the year beginning 1960, of whom approximately 1,900 are anticipated to be white students and 600 negro students. Teachers employed for the first grade, year 1959-1960 of the Knoxville School System numbered 84, of whom 63 were white persons and 21 were negroes.

[fol. 329] Insofar as quality of teaching is concerned, the Public Schools of Knoxville operated for negro students are substantially equal to the Public Schools of Knoxville operated for white students.

There is no difference in the salary schedules of negro teachers and white teachers.

The physical facilities for white and negro students are excellent.

Beginning with the year 1954 and continuing from time to time to the filing of the present suit, negro parents and children and other citizens have petitioned the School Board and appeared before the School Board and asked the Board to take immediate action towards desegregation of the Public School System.

On June 16, 1955, the Attorney General of Tennessee rendered an opinion to the State Commissioner of Education, and through him to the Superintendent of Education

for the State of Tennessee, in which he stated in substance that under the Tennessee Code it is the responsibility of each local school board to determine for itself the way in which it will meet the problems of desegregating the schools under its jurisdiction. As a result of this opinion, together with the decision of the United States Supreme Court in the *Brown* Case, the Board in a special meeting held on August 17, 1955 resolved that it would act in good faith to implement the constitutional principles declared in the *Brown* decision as applied to public schools, and would make a prompt and reasonable start towards those objectives.

The Superintendent and his administrative Staff were instructed to develop a specific plan of action leading to the gradual integration of the Knoxville public schools.

At a special meeting held on August 17, 1955, following the second *Brown* decision of May 31, 1955, the Board re- [fol. 330] affirmed its policy to work towards gradual desegregation.

Two Members of the Board and two Members of the supervisory Staff visited the integrated public schools of Evansville, Indiana in July, 1955 to study desegregation in those schools.

On August 17, 1955 the Board directed the Superintendent and his Staff to develop a plan of action leading to the gradual integration of the public schools and to that end the Superintendent and his Staff began holding meetings for the purpose of further exploring the subject. As an outgrowth of these meetings, the study council, composed of all principals, school administrators and supervisors (both white and negro) and the Superintendent of Schools, was formed for the purpose of exploring and studying plans and procedures in school desegregation. This study council held an additional series of meetings and formulated several possible plans for desegregation, eight of which were presented to the Board for the Board's study. These study groups continued with their meetings the remainder of 1955 and during the year 1956.

In the meeting of May 11, 1956, the Board announced that each of the eight plans for desegregation had been carefully

reviewed by the Board but that the Board did not feel at that time that desegregation of the Knoxville public schools could be successfully put into operation. Three reasons were given for such action:

(a) Segregation should not be attempted until the school building program is further advanced.

(b) The Members of the Board do not believe that the people of both races are ready for a definite plan for desegregation and that further delay would lessen the likelihood of unpleasant incidents which have occurred in some places where desegregation has been inaugurated.

[fol. 331] (c) Before any plan for desegregation is put into effect, further studies should be made of the subject, and plans further developed that the children of both races will not be handicapped by a radical change in their classroom life.

During the week of August 27, 1956, serious trouble developed in Anderson County, Tennessee in the integration of the Clinton High School. This trouble produced several tense hearings and trials in this Court. In September, 1957, a Nashville, Tennessee elementary school was bombed and severely damaged. On October 5, 1958, Clinton High School in Clinton, Tennessee was bombed causing damage estimated at $250,000.00 to $300,000.00.

A hearing was held by this Court on February 8, 1960 on plaintiffs' motion for a preliminary injunction prohibiting the defendants from refusing to admit or transfer the infant plaintiffs to the schools to which they had applied for admittance on account of their race or color and for the declaratory relief sought in the complaint. At this hearing, defendant, Board of Education, agreed that it would submit a plan for desegregation on or before April 8, 1960. Action on other phases of the relief sought in the complaint was postponed, pending the submission of the plan.

On April 8, 1960, the Board filed the following Plan, which is sometimes referred to as Plan Nine:

"1. Effective with the beginning of the 1960-61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961-62 school year racial segregation shall be discontinued in Grade Two and thereafter in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.

[fol. 332] 3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the School of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

6. The following will be regarded as some of the valid conditions to support requests for transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only;

   b. When a colored student would otherwise be required to attend a school previously serving white students only;

   c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

[fol. 333] One Board Member voted against the Plan, stating that "what the Board is doing is a mistake."

The Members of the Board are continuously changing, while the Members of the Administrative Staff remain constant. Certain Members of the Board are elected at biennial election and this puts the terms of the Members on a staggered basis.

Plaintiffs filed seven objections to the Plan on April 18, 1960. It is insisted by the plaintiffs in these objections that: (a) The Plan does not provide for elimination of racial segregation "with all deliberate speed" as required by the Fourteenth Amendment to the Constitution; (b) it does not take into account the five years which have elapsed during which the Board has failed and refused to comply with the Fourteenth Amendment; (c) a period of twelve years for the consummation of the Plan is not in the public interest and is not in compliance with the Fourteenth Amendment; (d) the defendants have not carried the burden of proof of showing problems related to public school administration as specified by the Supreme Court in the second decision of *Brown* v. *Board of Education* (May 31, 1955), 349 U. S. 294; (e) under the Plan, the infant plaintiffs and all other children attending the public schools of Knoxville in their class will be deprived of their right to attend a desegregated school as guaranteed to them by the Fourteenth Amendment; (f) the Plan deprives infant plaintiffs and those similarly situated from enrolling in Fulton Technical High School and other special vocational schools, summer courses and kindred educational training of a specialized nature as to which enrollment is not based upon residence; and (g) Paragraph 6 of the Plan violates the due process clause of the Fourteenth Amendment in that said paragraph provides racial factors as conditions to support [fol. 334] requests to transfer, and the racial factors are designed and necessarily operate to perpetuate racial segregation.

A trial was held on August 8-11, 1960 on defendants' motion for the adoption of the Plan and plaintiffs' objections thereto. Substantial testimony was introduced during the trial, a material portion of which consisted of the read-

ing of discovery depositions of various individual defendants and a number of adult plaintiffs.

The controlling issue in the case and to which the greater part of the evidence was directed is:

Is the time delay provided for in the grade a year desegregation proposal reasonably necessary in the public interest and is it "consistent with good faith compliance at the earliest practicable date"? See *Brown* v. *Board of Education, supra.*

It is the position of the Board that a more accelerated plan for desegregation would cause administrative problems of great magnitude and serious interruption in the operation of the Knoxville School System with resultant deleterious effects upon the school children of both races.

The Board maintains that the grade a year plan is a compliance with the "deliberate speed" concept in the light of the existing conditions in the Knoxville area.

As to the good faith phase of the issue, the Board insists that its Members, the then Superintendent of Schools and the Members of his Staff, began to consider the question of desegregation immediately following the first decision in the *Brown* Case in 1954 but that they withheld efforts to perfect a plan until the second *Brown* decision on May 31, 1955; that following this decision Board meetings and workshop meetings were held by the Board with principals of negro schools and white schools; and that much of the literature on the subject of desegregation was studied with the view of finding a plan that would meet the needs of the [fol. 335] Knoxville community and at the same time protect and enforce the constitutional rights of the negro children attending the public schools of Knoxville.

In support of the Plan, *Superintendent Johnston* testified that he became Superintendent on June 15, 1955 and that on the next day he asked his Administrative Staff to come together to discuss the Supreme Court's decision and steps that ought to be taken to study the best approach to compliance with the decision; that out of the meeting grew the suggestion that some Members of the Staff and of the Board visit a city with experience in desegregation; and that the City of Evansville, Indiana was chosen because of its com-

parable size and because it had been operating under a desegregated program since 1949. He testified that two Members of the Board and two Members of the Staff visited the schools in that City and spent a day or more in the schools and with the superintendent.

Subsequently, on July 25, 1955, he inaugurated a program of inviting white principals, Members of the Board and Staff to discuss how best to comply with the Supreme Court's decision. He attempted at the meeting to establish an atmosphere or environment under which these persons would talk freely on the subject.

A week later, they had a similar meeting with the negro principals, Members of the Board and Staff at which exactly the same matters were discussed in an atmosphere under which the negro principals would feel free to ask questions and make suggestions.

He testified that separate meetings were held at his own suggestion with the thought that participants would talk more freely if they met separately and that thereby he could better assess whether there was opposition or a good feeling about the whole business.

[fol. 336] At the same time, he inaugurated a series of Staff meetings for a period of an hour a day for 15 successive working days for the exchange of views on the problem.

On January 26, 1956, he testified that they convened a meeting of the negro principals and general supervisors in the central office to determine whether they were willing to participate in a series of meetings to consider the subject of desegregation. A similar meeting with the white principals came a few days afterwards.

On February 1, 1956, a Staff meeting was held to survey the willingness of principals of both groups to join in a study group or workshop. On February 2, 1956, all principals regardless of race were called for a meeting in the central office at which no shyness or reticence to discuss the subject appeared. He commented that for 32 years to his personal knowledge negro principals and white principals had met together in regular meetings.

He testified that a series of workshop meetings were developed to explore different plans and that out of these meetings there evolved eight suggestions to be submitted to the Board of Education without recommendation which were the result of the studies of the principals of both races and of the Staff.

Subsequently, in January, 1957 at a meeting, he requested the principals of both races and the supervisors to meet with him to further discuss the subject. At that meeting he indicated that he would like personally to come to the schools and sit down with their faculties and talk with the teachers to see how they felt on the subject because he felt that "the burden of making that plan successful . . . would be on the shoulders of the teachers who work closely with children and with parents." Following this meeting, he testified that he started going to schools at the invitation [fol. 337] of the principals and that he attended 12 to 15 such faculty meetings. It was his purpose to discover through these informal meetings whether there were members of the faculties who opposed any form of desegregation. He wanted to determine whether there were pockets of resistance or whether a favorable climate for compliance existed among the teachers. These meetings continued through the school year 1957. By Fall, he testified, the invitations seemed to slow down and that he seemed to detect a feeling amongst the negro and white principals which did not exist before. He pointed out that there had been dynamiting and other difficulties around the Knoxville area; and that trouble had arisen in Nashville and Clinton.

Superintendent Johnston stated that violence occasioned by desegregation in neighboring cities caused us to reflect a little more on how it will affect us and made us more conscious of what might happen here. He pointed out that no child could get an education operating under a feeling of fear or tension or emotional unrest and that every day a child loses from its normal educational program is practically gone forever and will never be completely regained; that order is the first law in the classroom and that an educational program must have order if children were going to learn. He said: "We were concerned with that."

At the same time, he noted that the School Board was engaged in an extensive building program which involved both Staff and Board and which was heavily time consuming; that Board and Staff Members examined blueprints and drawings of the architects minutely and that they made innumerable visits to the buildings when they were under construction and that before a building was accepted it was the duty of the Board to go through it, inspect the rooms, corridors and facilities in the company of the architect and of the representative of the contractor. [fol. 338] This was a massive building program carried out under Bond Referendums of 1946 and 1954 and involved nearly eight million dollars of new construction and remodeling in both white and colored schools.

In implementation of the Plan filed on April 8, 1960, the Superintendent testified that he instructed his Staff to begin work on a zoning map which was approved at a meeting of the Board on August 6, 1960, just two days before the hearings began. He testified that he instructed his Staff that in the preparation of the map there would be no maneuvering or gerrymandering, that the re-zoning and re-establishing of school zones must be based on enrollment studies and on the size and capacity of the buildings. The work was in charge of Mr. Frank Marable, Supervisor of Child Personnel, whose duty it is to check on attendance, school zones and the movement of people.

On cross-examination, he testified that in preparing the map, efforts were made through the pre-school round-up program and estimates of principals to get estimates of the number of children that would be affected. This zoning plan was confined to the elementary schools and did not include the secondary schools.

Under detailed cross-examination, Mr. Johnston pointed out that small groups or pockets of negro homes were scattered throughout the Knoxville City School System in contrast to major concentrations of negro citizens; that the zone boundaries were often dictated by artificial barriers like heavily traveled streets and also by the size and capacities of school buildings.

In response to a question that some capacity was preserved at Park Lowry for transfers which were authorized under the Plan, he testified that he had no way of knowing who was going to ask for a transfer and that he only knew that under the Plan white students and negro students would be treated alike.

[fol. 339] He testified categorically that no member of his Staff in working on the map had ever operated deliberately to cut out negro children; and that they tried to work the thing out on a fair basis, depending on the size of the building, shifting population and enrollment.

With reference to the fact that eight plans were originally developed for submission to the Board and that the Plan which was finally adopted involved only a grade a year desegregation, he testified that the Plan adopted was based on the experience around us and studies of the general situation of desegregation; that it was felt that this plan could be introduced in the City of Knoxville with the least disturbance to the over-all educational program; and that it would be accepted by the majority of citizens with less tension and less emotional excitement than ary other plans that had been studied.

He reiterated that the Knoxville School System had been in existence since 1870 and that desegregation would not be easy; that it was the goal to achieve desegregation and at the same time maintain an orderly decorum or environment under which all children could continue to go to school day by day free from tension and free from fear. He repeated that order is the first rule of a classroom.

In presenting the grade a year plan to the Board, the Staff made seven observations in favor of the plan. The first was that it appeared to meet the requirements of the Supreme Court decision and of the laws of the State which placed the burden or responsibility on local boards for desegregation and for the assignment and placement of students. Second, the Plan did not limit the speed with which it could be implemented. Third, it provided for gradual implementation until the complex problems of zoning, transfer and assignments of students could be [fol. 340] adjusted in the light of experience. Fourth, it had the advantage of numerous other plans as a back-

ground for its adoption. Fifth, the main features of the Plan have been upheld by higher courts. Sixth, the Plan lessened the opportunity for developing prejudices. Seventh, it minimized the possibility of administrative problems that could be of such complexity and magnitude as to seriously undermine and impair the total educational program of the City.

Finally, he emphasized the adaptability of small children and that they do not have the prejudices of older children or grown people and could be fitted into the work easier than older children. He felt that the gradual plan would enable the school system to continue a fine educational program with less tension, less fear and less emotional disturbances than a plan which rushed into a broader field of desegregation. He felt that the gradual plan would have the sympathetic understanding of the great majority of the citizens of the City. He pointed out the importance of this in going before the City Council on behalf of school budgets with which to operate the schools; that the School System had to have the sentiment of the people with it because it involves budgets, their attitude towards referendums for new schools and new buildings, etc.

With reference to evidence that there had already been desegregation of ball parks, public libraries, buses and airport restaurants, etc. in and around Knoxville and that this would seem to indicate that a speedier plan of desegregation could be inaugurated, Superintendent Johnston pointed out that under the compulsory attendance law, children are compelled to go to school for a period of seven hours a day and that he knew of no law that compelled them or any adult to go to a ball park, the library or airport restaurants. He pointed out that those were optional matters, but that under the school law children were required to go to school.

[fol. 341] In the course of his testimony, Superintendent Johnston testified to certain achievement tests given all children in the sixth grade in the Knoxville schools. His testimony was that as a result of these tests it appeared that the achievement levels of students from white schools were somewhat above the national norm and that the student level from colored schools were substantially below

the national norm. This testimony was objected to by the plaintiffs on the ground that the results of the tests were hearsay. The Court recognized this objection, but admitted the testimony for such bearing as it might have on the good faith of the Board in utilizing the grade a year plan.

In his deposition, Superintendent Johnston was asked about the industrial courses given at Austin High School, the colored school, and at Fulton High School, the white technical school. It appeared from his testimony that Fulton High gives a course in television, a course in advanced electronics, ones in air conditioning, refrigeration, commercial art, commercial photography, distributive education, drafting, machine shop, printing and sheet metal which are not offered at Austin High School. Certain courses, he testified, such as brick masonry, tailoring, etc., are offered at Austin which are not offered at Fulton.

Colored students are not admitted to these courses at the present time at Fulton High School because of the segregated schools.

Generally, the testimony of Superintendent Johnston was that the school facilities and teaching level at both the colored and white schools are equal. He pointed out that the colored teachers are paid at the same salary level as those in the white schools and that the work done is equivalent. These facts were also stipulated.

The conclusion the Court draws from this evidence is that students including plaintiffs now in school who would [fol. 342] not, if Plan Nine were adopted, be permitted to go to an integrated school, would still have equal opportunities for an education in the fine colored schools with their excellent teaching staffs.

This conclusion is not true of the special technical courses offered at the Fulton High School. Under Plan Nine colored students now in school and desiring those courses would be barred from taking those courses. They would have to complete their scholastic education without the opportunity of taking these courses. Superintendent Johnston testified that he had talked to the teachers in the Fulton High School and they were of the opinion that to admit colored students to these courses would cause trouble and disciplinary problems, an opinion in which he joined.

Nevertheless, the Court feels that despite the great merit of Plan Nine, it is deficient in that it precludes colored students now in school from ever participating in these specialized courses.

Dr. Burkhart, Chairman of the Board since 1958, was of the opinion that complete desegregation would disrupt the orderly process of education in Knoxville and that the children of both races would be materially affected thereby. This opinion was based in part on the attitude of the great majority of the citizens of the Knoxville area who feel that the citizenship is not prepared at this time to accept anything except gradual desegregation. He was further of the opinion that complete desegregation would cause violence in the community.

This Court recognizes that the Supreme Court stated in substance in *Cooper* v. *Aaron*, 358 U. S. 1, that opposition to desegregation was not alone a sufficient reason to postpone desegregation. But, the Court also stated in substance in *Brown* v. *Board of Education*, 347 U. S. 483 that one of the factors that the trial court should consider in resolving [fol. 343] the question of immediate and complete desegregation or gradual and complete desegregation is the interest of the people who are affected in the community.

Dr. Burkhart was of the opinion that gradual desegregation would be best for the students and for the community. He felt that an abrupt change would affect the teachers and the students of both races and would create serious administrative problems.

Dr. Moffett, another Member of the Board, felt that Plan Nine was the best plan for the Knoxville schools and gave three principal reasons to support his belief, which are in substance as follows:

(a) First grade eliminates any educational advantages or disadvantages.

(b) The present Plan is more receptive to constituents.

(c) The present Plan is better for teachers and other personnel of the schools.

Andrew Johnson, a well-known lawyer of Knoxville, served as a Member of the Board from January 1, 1954 through December 31, 1957. He explained in detail the careful study made by Members of the Board and school personnel during the period that he was a Board Member.

A building program involving some eight million dollars was inaugurated and extensively carried on while he served as a Member of the Board. This program consumed considerable time of Board Members.

A series of meetings were held by Board Members with the Superintendent and his Staff during the year 1955 when desegregation matters were discussed. The initial attitude of the Board was to comply with the law with respect to desegregation as declared by the Supreme Court in the *Brown* Case. In 1954, the Members of the Board felt that [fol. 344] desegregation could be effectuated without too many problems because the citizenship at that time appeared to be passive. Later, the Board Members began to hear rumbling of the disturbances from citizens and when actual violence began in Clinton, it caused the Board to go slow. This violence gave rise to a consciousness of the Members of the Board of the dangers of making an unwise step. The Board was delayed by circumstances over which it had no control.

The opinion of the public influenced the actions of the Board. The Board was looking at local conditions. Threats of violence were made if desegregation were inaugurated. On June 10, 1957 some fifteen citizens appeared before the Court and some of them suggested that the Board Members resign rather than institute desegregation. There was real danger.

One John Kasper appeared before the Board that night. Mr. Johnson received a number of telephone threats. The Members of the Board were afraid of physical violence against the colored children. At that time, the colored principals of the schools felt that desegregation should be given thorough consideration, but that it should not start immediately.

The dynamiting and other violence in Clinton and Nashville were other causes for the Board moving towards desegregation more slowly.

Mr. Marable is Supervisor of Child Personnel. He handles transfers. He stated that the schools were overcrowded in some sections. Transfers were comparatively easy under the old plan although they are considered carefully. If the reasons are good, a transfer is made. It is an administrative matter. Primarily, a child is expected to go to school in the zone of his residence.

Plaintiffs, Mrs. Barber, and Messrs. Robinson, Sr., Ward, Graves, Winton, Sr. and Goss, testified to having made [fol. 345] applications for admittance of their minor children to white schools, all as shown in the complaint and the stipulation, and that they were denied admittance solely because of their race or color. Each of these plaintiffs gave a reason why he wanted his infant child to attend a white school, one of the reasons being that he or she lived near the white school.

This Court is of the opinion and finds that the foregoing evidence shows beyond question good faith on the part of the Board in making an honest effort to find the solution of a very troublesome problem, namely, a plan of desegregation that would best fit the needs of the Knoxville area and at the same time implement the decision of the Supreme Court in the *Brown* Case. The teaching of that case, as well as that of the cases of *Cooper* v. *Aaron*, *supra* and *Kelley* v. *Board of Education* (C. A. 6), 270 F. 2d 209, is that the problem of desegregation must be solved in accordance with the exigencies of the case and that the interest of the school children of both races, the interest of the school personnel and of the community involved are the prime factors in resolving the issue; that local school problems differ and what would be a reasonable time to integrate in one community might be unreasonable in another community; that the question of speed is to be decided with respect to existing local conditions; that the operation of the public schools is the business of the local School Board and that the courts should not interfere with such operation unless it is necessary for the enforcement of constitutional rights; and that the Court should not substitute its judgment for that of the local School Board in the promulgation of plans of desegregation and that if the Board has acted in good faith its action should not be set

aside so long as such action is consistent with the eventual establishment of a non-discriminatory school system at the [fol. 346] earliest possible date consistent with the interest of the school children, school personnel and the community.

The Court finds that the Plan submitted by the Board is not only supported by the preponderance of the evidence, but by all of the evidence, with one exception. With reference to the technical courses offered in the Fulton High School to which colored students have no access, it directs that the defendants in this cause restudy the problem there presented and present a plan within a reasonable time which will give the colored students who desire these technical courses an opportunity to take them.

This Court is concerned—gravely concerned—with the incidents of unrest and violence which have attended the desegregation of schools in nearby communities. They have not only been made matters of evidence in this case, but some are matters with which this Court has had to deal, and of which it takes judicial notice. These incidents have been characterized by the bombing of homes and of school buildings and by acts of individual terrorism which have destroyed the orderly atmosphere in which good schooling can thrive. They have revealed pockets of hate and lawlessness which are overshadowing imponderables in this case.

Glowing pictures of what may be, or ought to be, characterize the partisanship of those not called upon to make decisions. It is easy to ignore, and many of these partisans have ignored, considerations which weigh so heavily upon the Court. Some who might have taken responsibility have, despite the admonitions of the Supreme Court in the *Brown* and other cases, chosen not to assume it.

As the case has developed, the ultimate responsibility for decision rests with the Court. It alone must deal with the realities—realities with which it has had acrid experience.

If it decides wrongly, the transition towards the goal of a harmonious and unified school system—a goal to which all [fol. 347] parties to this case subscribe—will receive an untold setback. If it decides rightly, there may well be smooth and steady progress toward full integration. Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by

the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there.

Perhaps the transition could be faster. Who can know? When a bridge is built or modified, engineers add a factor of safety far beyond the expected load. The analogy breaks down. In altering a school system, no one knows the load: there is no known factor of safety. Traditions, ways of thinking, aspirations, human emotions—all are involved. Emotions are sometimes stable, sometimes explosive. This Court has had experience with both. It rather anticipates that the emotions of the people of Knoxville are under control. It does not know. It would have had the same expectation of another community. It was wrong.

All things considered, Plan Nine seems to offer more safety and more assurance for an orderly progression toward a fully unified school system. Under the evidence, there is less danger of disorder—more hope of steady progress. When the risks of which this Court is cognizant are taken into account, Plan Nine seems to meet the tests laid down by the Supreme Court. The Plan, with the reservation noted, is approved.

Present order in accordance with views herein stated.

Robt. L. Taylor, United States District Judge.

[fol. 348]

IN UNITED STATES DISTRICT COURT

JUDGMENT—August 26, 1960

This cause came on to be heard on August 8, 9, 10 and 11, 1960, upon the entire record, upon stipulations, oral testimony, depositions and exhibits, without the intervention of a jury, and upon briefs and argument of counsel, pursuant to which the Court on August 19, 1960, filed its Memorandum, all of which are herein incorporated by reference.

It is, therefore, Ordered, Adjudged and Decreed, as follows:

1. That the Plan of The Board of Education of the City of Knoxville, approved by said Board on April 4, 1960, and presented to this Court on April 8, 1960, be approved with the single exception that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them. The defendant Board of Education of the City of Knoxville, Tennessee is hereby ordered to put said Plan as approved by this Court into effect in accordance with the tenor thereof.

2. That the prayer of the plaintiffs for injunctive relief and their motion for preliminary injunction be, and the same hereby are, denied.

3. That the jurisdiction of the action is retained during the period of transition.

[fol. 349] To the foregoing actions of the Court, as contained in Paragraphs numbers 1. and 2. hereinabove, the plaintiffs except.

Robt. L. Taylor, United States District Judge.

[fol. 350]

IN UNITED STATES DISTRICT COURT

EXHIBITS TO PLAINTIFFS' MOTION FOR NEW TRIAL AND APPROPRIATE RELIEF

EXHIBIT 1(a)

STATE OF TENNESSEE)
) SS
COUNTY OF KNOX)

AFFIDAVIT

Carl A. Cowan makes oath in due form of law and says that he is one of the attorneys of record for the plaintiffs in

the case of Josephine Goss, et al v. The Board of Education of the City of Knoxville, Tennessee, et al, Civil Action No. 3984 and further says:

That the attached copy of the minutes of the Special Meeting of the Board of Education of the City of Knoxville, Tennessee on August 22, 1960, marked Exhibit 1(b) was furnished him, at his request, by the Office of the Superintendent of City Schools of Knoxville through counsel for the defendants; and that said minutes show on their face, page 2 thereof, that the said Board on said date adopted the following policy for first grade enrollment:

> "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended."

/s/ Carl A. Cowan
Carl A. Cowan

Sworn to and subscribed before me
this 2nd day of September, 1960.

/s/ Chester T. Baylor Notary Public
My Commission expires Jan-23-1961

[Seal]

[fól. 351]

In United States District Court

Exhibit 1(b)

Special Meeting of the Board of Education
Knoxville, Tennessee

Special Meeting of the Board of Education held in the office of the Board at Fifth and Central on Monday evening, August 22, 1960 at 7:30 P.M.

Members present: Dr. Burkhart, Mrs. Keith, Mr. Linville, Dr. Moffett and Mr. Ray.

The Chairman called the meeting to order and called on Miss Clara McCauley, Principal of the Giffin Elementary

School, to open the meeting with an invocation which was followed by the Pledge of Allegiance to the Flag.

The Chairman stated that this special meeting of the Board had been called for the purpose of hearing recommendations from the Superintendent, and taking such action as might be deemed advisable in order to implement the recent decision of Judge Taylor relative the desegregation of the Knoxville City Schools.

REVIEW OF JUDGE TAYLOR'S DECISION

Superintendent Johnston distributed copies of the 21 page decision made by Judge Taylor in the case of Josephine Goss et al vs. Board of Education of the City of Knoxville, Tennessee et al. There followed some discussion of this decision with particular reference to the section requiring the Board of Education to re-study the problem and to present a plan within a reasonable time which will give the colored students who desire technical courses an opportunity to take them. Rev. Frank Gordon informed the Board that he had the list of a number of students who desired to take advanced electronics, commercial art, photography and retail merchandising.

[fol. 352] The Board also heard from the Director of Adults and Vocational Education, Mr. E. N. Aslinger, the number of pupils enrolled in the trade classes at the Fulton High School.

At the conclusion of these discussions, Dr. Moffett moved and Mr. Linville seconded a motion that the Superintendent be requested to proceed immediately to make the necessary studies relative the vocational courses and to submit recommendations to the Board of Education. Motion carried.

INSTRUCTIONS FOR ENROLLING FIRST GRADE STUDENTS

Superintendent Johnston presented the following two suggestions for instructions for first grade enrollments.

"SUGGESTION #1

a. Parents of first grade pupils should enroll them in the elementary school within their new school zone or they may choose to enroll them in the school which they

would have previously attended in which case the principal will assist them in securing a special transfer.

b. All children above the first grade should enroll in the school they attended last year.

SUGGESTION #2

All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended."

On motion made by Mr. Ray and seconded by Dr. Moffett, it was moved that the Board approve Suggestion #2 as submitted by the Superintendent. Motion carried.

[fol. 353] REQUEST FOR NEWSPAPER TO PUBLISH ZONE DESCRIPTIONS AND CITY-WIDE MAP

Superintendent Johnston presented copies of the zone descriptions and the city-wide map showing the boundaries for all of the schools and requested that the Board join in a request to the newspapers to publish these school zone descriptions. Following considerable discussion of the various zone descriptions both on the part of the Board and Rev. Frank Gordon and Mr. Frank Marable, Supervisor of Child Personnel, Dr. Moffett moved and Mrs. Keith seconded a motion that the Board approve the descriptions of the school zone areas as recommended by the Superintendent. Motion carried, with Mr. Ray voting "No".

Dr. Moffett moved and Mr. Ray seconded a motion that the Board solicit the cooperation of the newspapers in publicizing the zone descriptions and the city-wide map, and to request the radio and television facilities to call attention to these new school boundaries and, furthermore, that the Board commend the newspapers and the radio and television communication facilities for their efforts in providing school information to the public. Motion carried. (Copy of zone descriptions in the Board Minute File.)

COPY OF GRADE-A-YEAR PLAN

Superintendent Johnston distributed as a matter of information a copy of the Grade-A-Year Plan which had been submitted to the Court and approved.

REAFFIRMATION OF RESOLUTION PRESENTED BY DR. MOFFETT AND ADOPTED UNANIMOUSLY BY THE BOARD ON APRIL 4, 1960.

Superintendent Johnston presented the following resolution which had been presented by Dr. Moffett at the Board [fol. 354] meeting on April 4th and recommended that the Board reaffirm its position taken in the unanimous adoption of this resolution.

> "The Board of Education calls upon all people of good will in Knoxville to join it in an attempt to comply with Court orders and to deal effectively with the question at issue in such a manner as to reflect deserved credit upon our wonderful city. The Board is fully mindful of the fact that time is short for the orientation work required and for this reason, among others, calls upon all citizens, wherever possible, to join it in its attempt to make possible for its students, teachers, supervisors, and administrative staff, the most satisfactory adjustment to this gigantic challenge. In effect, the question of desegregation in the public schools is a community-wide problem and requires complete community cooperation in arriving at a solution. Finally, it is the earnest hope of this Board that all of the people of Knoxville concerned with this problem will understand that the Board of Education will stand *firmly* back of its agents in an attempt to comply in all good faith with the mandate of the law and the rulings of the courts on the subject of desegregation."

On motion made by Mr. Ray and seconded by Mrs. Keith, it was moved that the Board reaffirm its approval of this resolution as adopted unanimously at the Board's meeting on April 4, 1960. Motion adopted unanimously.

Superintendent Johnston suggested that the Board might consider the desirability of assisting the administration as a committee during the next few weeks in resolving any unusual problems as they might arise.

[fol. 355] In response, the various members of the Board indicated to the Superintendent that they would be available to the administration at any time to assist in any way they could in resolving any problems which he felt should be presented to them.

MOUNTAIN VIEW ELEMENTARY SCHOOL

The Superintendent informed the Board that a survey was to be made by Mr. Marable's office with regard to the pupils in the Mountain View area who were transported to Park City Lowry School last year. He stated that as soon as the survey is completed, which should be at the end of this week, a report with recommendations will be given to the Board of Education.

EXECUTIVE SESSION

The Chairman requested the members of the Board to join him in a very brief executive session where a matter involving personnel needed to be discussed.

ADJOURNMENT

On motion made by Mr. Ray and seconded by Mrs. Keith, it was moved that the meeting of the Board be adjourned. Motion carried.

[fol. 356]

IN UNITED STATES DISTRICT COURT

EXHIBIT 2(a)

STATE OF TENNESSEE)
) SS
COUNTY OF KNOX)

AFFIDAVIT

Sharaon Smith makes oath in due form of law and says that she is one of the infant plaintiffs in the case of Josephine Goss, et al v. The Board of Education of the City of Knoxville, Tennessee, et al, Civil Action No. 3984; that she is presently enrolled in the 12th grade of Austin High School of Knoxville, Tennessee; that she is 17 years of age; that she is a resident and citizen of the City of Knoxville of Knox County in the State of Tennessee, residing at 2772 Selma Avenue, Knoxville, Tennessee, and further says:

That she attended the Special Meeting of the Board of Education of the City of Knoxville, Tennessee which was held on Monday night, August 22, 1960 in the Board room of the School Administration Building located at the corner of Central Avenue and Fifth Street, Knoxville, Tennessee; that during said meeting the Board adopted the following policy regarding first grade pupils:

> "All first grade pupils should either enroll in their new school zone or in the school which they would have previously attended."

The affiant further says that she had read the attached news-paper article headed "Under Integration Plan—Policy on Transfer of Pupils Adopted" of The Knoxville News-Sentinel, under date of August 23, 1960, marked Exhibit 2(b), and that said Article correctly reports the action of the Board of Education at their said meeting [fol. 357] which was held on Monday night, August 22, 1960, and particularly reports correctly the policy of the

Board adopted regarding the enrollment of first grade students under their desegregation plan.

/s/ SMITH, SHARON
Sharon Smith

Sworn to and subscribed before me
this 2nd day of September, 1960

/s/ C. A. COWAN Notary Public
My commission expires July 21, 1964

[SEAL]

[fol. 358]

IN UNITED STATES DISTRICT COURT

EXHIBIT 2(b)

THE KNOXVILLE NEWS-SENTINEL Tuesday Aug. 22, 1960
UNDER INTEGRATION PLAN

POLICY ON TRANSFER OF PUPILS ADOPTED

WHAT CITY SCHOOL BOARD DID

Adopted a policy to allow liberal transfer of pupils under the integration plan.

Asked for an immediate study of ways to provide vocational courses for Negroes.

Approved the descriptions of zones around the schools.

Reaffirmed a resolution of April 4 asking Knoxvillians to co-operate on desegregation.

A first-grader in a school zone in which his race is in the minority won't have to report to that school Aug. 31 if he doesn't want to. Instead, he can report to the school he ordinarily would have attended had there been no integration.

That is the meaning of a policy adopted by City Board of Education last night to clarify the transfer provisions of the grade-a-year integration plan approved by Federal Judge Robert L. Taylor.

The simple policy states: "All first grade pupils should either enroll in their new school zone or in the school which they would have previously attended."

The board also instructed Supt. Thomas N. Johnston to begin "immediately" to study ways of providing vocational courses for Negro students that are now taught only to white students at Fulton High School. Judge Taylor has told the board to present him a plan on this.

The "valid" reasons given in the integration plan for requesting a transfer are:

1. When a white pupil would otherwise be required to attend a school previously serving Negro pupils only.

[fol. 359] 2. When a Negro pupil would otherwise be required to attend a school previously serving white pupils only.

3. When a pupil would otherwise be required to attend a school where the majority of pupils of that school or in his or her grade are of a different race.

Mr. Johnston said it will be "unusual" to turn down a transfer under the plan, but that he doesn't think a pupil should be allowed to "transfer from zone to zone every time changes his mind. We can't allow transfer back and forth all year long."

However, he added that he thinks the transferring will "settle down in three to six weeks" after school starts.

Time Limit Uncertain

Mr. Johnston told the board that its attorney, S. Frank Fowler, is out of town and he has not had a chance to ask him what he thinks Judge Taylor means by "reasonable time" in presenting a plan on vocational courses for Negroes.

Vocational courses, Mr. Johnston said, are set up on the need for the courses and the employment opportunities for students taking them.

Board Member Robert Ray noted that the Third Circuit Court of Appeals in Philadelphia has stricken out a similar grade-a-year plan adopted in Delaware. "I wonder if we shouldn't do something to remedy the situation at Fulton

now," he said, "and not leave ammunition on the battlefield."

"Do you seriously think you can refuse a student of the colored race on the theory of employment opportunities?" Mr. Ray asked.

[fol. 360] "I would certainly like to find out if there are employment opportunities" for Negroes, Mr. Johnston replied, "I plan to study the whole business. If it turns out best to put them (the Negroes) at Fulton, that will be it. If it is best to put the courses at Austin, we'll put them there."

Prefer Fulton

The Rev. Frank Gordon, pastor of Shiloh Presbyterian Church who was accompanied to the board meeting by Negro student, Josephine Goss, one of the plaintiffs in the integration lawsuit, told the board that several Negro students want to take the vocational courses taught at Fulton High and prefer to study them at Fulton rather than at Austin High.

Mr. Gordon said 10 or 11 seniors at Austin who studied electronics and television there last term want to take advanced work at Fulton. Other students want to study commercial art, he said. Three or four are interested in photography; others want printing. One or two asked about air-conditioning and one about retail advertising, a distributive education course. Thus far, none of the Negro students have asked about welding or veterans training, Mr. Gordon said.

Figures Given

E. N. Aslinger, director of adult and vocational education, told the board that the vocational courses at Fulton will accommodate 20 students per class, and that the number enrolled in each course is as follows:

Printing, 19 each in two classes; photography, 19; television, 14; commercial art, 20; air conditioning, 17 each in two classes.

[fol. 361] The board, by a 3-to-1 vote, approved the descriptions of the zones around each school. There was a

mild exchange between Mr. Ray and Mr. Johnston before the vote was taken.

Mr. Ray claimed there was some "gerrymandering" in some of the zones. Mr. Johnston retorted that there was "no attempt to gerrymander. I have said so under deposition and under oath that I was not going to put up with it."

Mr. Ray wanted to know why some of the boundary line streets shown on the zone map are not included in the zones themselves.

Based on Capacity

Mr. Johnston said each zone is based on the size of the school building in it and the number of children it will accommodate.

Dr. Charles Moffett, Mrs. Gilmer Keith and Roy Linville voted to approve the zones. Mr. Ray voted against it.

The board unanimously reaffirmed a resolution it adopted on April 4 calling upon "all people of good will in Knoxville to join it (the board) in an attempt to comply with court orders and to deal effectively with the question at issue in such a manner as to reflect deserved credit upon our wonderful city."

The resolution also asked citizens, "wherever possible, to join it in its attempt to make possible for its students, teachers, supervisors and administrative staff, the most satisfactory adjustment to this gigantic challenge. In effect, the question of desegregation in the public schools is a community-wide problem and requires complete com- [fol. 362] munity co-operation in arriving at a solution. It is the earnest hope of this board that all of the people of Knoxville concerned with this problem will understand that the Board of Education will stand firmly back of its agents in an attempt to comply in all good faith the mandate of the law and the rulings of the courts on the subject of desegregation."

Almost All Affected

Mr. Gordon said he has found that nearly all schools in the city will be affected by integration and not just those first mentioned.

"All of them might be affected before it is over," Mr. Johnston said.

Mr. Johnston also told the board that a survey is being made of the white pupils in the Mountain View Elementary School area who were transported to Park City Lowry Elementary last year, to determine which school is nearest them so that public transportation can be provided. The board plans to use Mountain View as a Negro school this year.

The board also voted to request the newspapers to publish the zone descriptions and to request the radio and television stations to ask their listeners and viewers to read the zone descriptions in the newspapers. The board thanked the press, radio and TV for what they have done already toward explaining the integration plan.

The zones pertain only to first-graders. Other pupils will attend the school they were in last year.

[fol. 363]

IN UNITED STATES DISTRICT COURT

EXHIBIT 3(a)

STATE OF TENNESSEE)
) SS
COUNTY OF KNOX)

AFFIDAVIT

Reverend Carroll M. Felton affirmed in due form of law and says that he is a resident and citizen of the City of Knoxville of Knox County in the State of Tennessee, residing at 136 Morningside Drive, S. E., Knoxville, Tennessee; that he is 34 years of age; that he is an ordained Minister of the Gospel, and further says:

That he was present at the Special Meeting of the Board of Education of the City of Knoxville, Tennessee, which was held on Monday evening, August 22, 1960 in the office of the Board in the School Administration Building, 101 E. 5th Avenue, Knoxville, Tennessee; that the Board upon the recommendation of Mr. Thomas N. Johnston, Superintendent of the City Schools of Knoxville, Tennessee, adopted

the following policy with reference to the admission and transfer of pupils under the grade-a-year plan of desegregation:

> "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended."

The Affiant further says that he has read the attached news-paper article headed "School Board Adopts Desegregation Policy" of The Knoxville Journal, under date of August 23, 1960, marked Exhibit 3(b), and that said article correctly describes the action of the Board of Education at their said meeting held on Monday evening, August 22, 1960, and particularly states correctly the policy of the [fol. 364] Board with reference to the enrollment of first grade pupils under the Board's grade-a-year desegregation Plan recently approved by the Federal Court.

/s/ CARROLL M. FELTON
Reverend Carroll M. Felton

Affirmed and subscribed before me
this 2nd day of September, 1960

/s/ C. A. COWAN Notary Public

My commission expires July 21, 1964

[SEAL]

[fol. 365]

IN UNITED STATES DISTRICT COURT

EXHIBIT 3(b)

THE KNOXVILLE JOURNAL
Tuesday, August 23, 1960

SCHOOL BOARD ADOPTS DESEGREGATION POLICY

BY RALPH GRIFFITH

City School Board last night adopted a policy setting up the mechanics of students transferring from one school to another under the grade-a-year plan for desegregation and directed Supt. T. N. Johnston to immediately start a study of vocational courses offered to whites, but not to Negroes.

Here is the policy the board adopted for first grade enrollment when schools open Aug. 31:

"All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended."

This means that a student in a zone where a majority of the other students are of opposite race may enroll at the school in the zone or the school he would have attended under the old zoning, which would contain a majority of students of his own race.

Johnston asked board members to pick one of two plans. The other plan would have required the principal to assist students who want a transfer, but this plan was rejected when the board decided that the operation of the policy was an administrative matter.

Johnston was also directed to start immediately a study of vocational courses now offered at Fulton High School and not offered at Austin High School, and those offered at Austin and not at Fulton and return with a recommendation for a solution to the problem.

[fol. 366] This was in compliance with Federal Judge Robert L. Taylor's request in his approval of the grade-a-

year program. Judge Taylor noted in his opinion that there are inequities in the vocational field.

Board Member Robert Ray turned attention to the Fulton and Austin situations shortly after the meeting opened by wondering "if we shouldn't do something at Fulton now."

Johnston said that his interpretation of Judge Taylor's opinion was that a study should be made and a plan of action submitted.

Rev. Frank Gordon told the board that from 25 to 30 Negroes had already approached him about attending classes this fall at Fulton that are not offered at Austin. These classes include: commercial photography, commercial printing, commercial art; air conditioning and refrigeration and an advanced course in television and electronics.

Johnston told board members he was not anticipating any "great difficulty," but he asked them to be ready to meet on short notice to consider any unusual problems that might arise. Board President Dr. John Burkhart said the board would be ready to meet on short notice on problems of desegregation or any other.

The board also reaffirmed its request to students and citizens of Knoxville to relp during this transitional period. A resolution making this request was first passed April 4, at the request of Board Member Dr. Charles Moffett. The resolution states in part:

"The board . . . calls upon all people of good will in Knoxville to join it in an attempt to comply with court orders and to deal effectively with the question at issue in such manner as to reflect reserved credit upon our wonderful city . . .

[fol. 367] In effect, the question of desegregation in the public schools is a community-wide problem and requires complete community co-operation in arriving at a solution . . .

"It is the earnest hope of this board that all of the people concerned will understand that the board will stand firmly back of its agents in an attempt to comply in all good faith with the mandate of the law and the rulings of the courts on the subject of desegregation."

[fol. 368]

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL AND FOR APPROPRIATE RELIEF—
Filed September 2, 1960

Come the plaintiffs and move the Court, pursuant to Rule 59(n) (2), (e) and Rule 60(b), (2), (5), or (6) of the Federal Rules of Civil Procedure, for a new trial and for appropriate relief from the operation of the judgment entered by the Court in the above cause on 26 August 1960, upon the following grounds:

1. That the defendant, The Board of Education of The City of Knoxville, Tennessee on or about 22 August 1960, as shown by the affidavit of Carl A. Cowan, attached hereto with attached copy of the minutes of the Special Meeting of the Board of Education, Knoxville, Tennessee, marked Exhibit 1(a) and 1(b), respectively; the affidavit of Sharon Smith, attached hereto with attached news-paper article headed "Under Integration Plan—Policy on Transfer of Pupils Adopted" of The Knoxville News-Sentinel, dated August 23, 1960, marked Exhibit 2(a) and 2(b), respectively, and the affidavit of Reverend Carroll M. Felton, attached hereto with attached news-paper article headed "School Board Adopts Desegregation Policy" of The Knoxville Journal, dated August 23, 1960, marked Exhibit 3(a) and 3(b), respectively, and incorporated herein by reference and made a part of this motion, adopted and announced to the public the following policy regarding enrollment of the first grade pupils under the plan approved by the Court in said judgment:

> "All first grade pupils should either enroll in their new school zone or in the school which they would have previously attended."

(a) The aforesaid plan approved by the Court, as further elucidated by the foregoing policy of said defendant, [fol. 369] expressly contemplates the continued maintenance by defendants of white and Negro schools as maintained and operated by them in the past, and permits continued

routine assignment of pupils to said racially designated schools on a racial basis rather than requiring assignment of pupils according to zones without regard to race or color.

(b) Under the plan, as elucidated by the procedure established in said policy, pupils will be assigned routinely to said Negro and white schools according to race, as in the past, without regard to non-racial school zones and without regard to a transfer procedure in which the pupil affirmatively seeks a transfer from his school in the non-racial zone to another school.

(c) Said policy manifestly is designed to impede pupils' free choice to attend a school in their zone, and is designed to influence students or parents to remain in segregated schools, in that it readopts, as a part of defendants' official assignment policy under and pursuant to the plan, defendants' past policy of assigning pupils to racially designated schools.

(d) Said policy adopted by the Board on 22 August 1960, therefore affirms and establishes plaintiffs' contentions, made in their specifications of objections to said plan filed in this cause, and pursued by plaintiffs upon the hearing on August 8, 9, 10, and 11, 1960, that the transfer provisions contained in paragraph six (6) of said plan violate the Fourteenth Amendment to the Constitution of the United States, and are unconstitutional and void, in that said transfer provisions are predicated on racial factors and are manifestly designed by defendants to perpetuate racial segregation.

[fol. 370] 2. Plaintiffs were prevented from presenting the foregoing grounds of this motion to the Court upon the hearing because the defendants declined to disclose at that time the specific manner in which said transfer provisions of the plan would operate.

Wherefore, plaintiffs respectfully move the Court that they be granted a new trial and/or that the Court grant them appropriate relief from the operation of said judgment, to the end and extent that said transfer provisions contained in paragraph six (6) of said plan heretofore ap-

proved by the Court, be disapproved by the Court as in violation of the Fourteenth Amendment to the Constitution of the United States.

Carl A. Cowan, 101½ W. Vine Avenue, Knoxville 2, Tennessee;

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee;

Jack Greenberg and Thurgood Marshall, 10 Columbus Circle, New York 19, New York, Attorneys for Plaintiffs.

[fol. 371] Certificate of Service (omitted in printing).

[fol. 372]

IN UNITED STATES DISTRICT COURT

Civil Action No. 3984

[Title omitted]

ORDER—September 6, 1960

The plaintiffs have filed a motion for a new trial and for appropriate relief from the operation of the Judgment entered by the Court in said cause on August 26, 1960.

The Court having examined the Motion and attached affidavits and exhibits and having also examined Plaintiffs brief in support of said motion and being of the opinion that it is without merit, it is, therefore, ordered that said motion be, and the same is, denied.

Robert L. Taylor, United States District Judge.

[fol. 373]

IN UNITED STATES DISTRICT COURT

Civil Action No. 3984

[Title omitted]

NOTICE OF APPEAL—Filed September 23, 1960

Notice is hereby given that the plaintiffs, above named, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 26th day of August, 1960 and from the order denying plaintiffs' motion for new trial and appropriate relief pursuant to Rule 59 (a), (2), (e) and Rule 60 (b), (2), (5) or (6) of the Federal Rules of Civil Procedure entered in this action on the 6th day of September, 1960.

[fol. 375]

IN UNITED STATES COURT OF APPEALS

Before: Cecil, Weick, and O'Sullivan, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 30, 1961

This cause is argued by A. N. Williams, Jr. and Jack Greenberg for plaintiffs-appellants and by S. Frank Fowler for defendants-appellees and is submitted to the court.

[fol. 376]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—April 3, 1962

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be and the same is hereby affirmed in part, modified in part, and the cause is remanded for further proceedings consistent with the opinion filed herein.

Approved for entry:

Lester L. Cecil, United States Circuit Judge.

[fol. 377] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14425

JOSEPHINE GOSS and THOMAS A. GOSS, Infants by RALPH GOSS, Their Father and Next Friend, et al., Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, a Body Corporate or Continuous Legal Entity, c/o DR. JOHN H. BURKHART, President, et al., Appellees.

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division.

OPINION—April 3, 1962

Before: Cecil, Weick and O'Sullivan, Circuit Judges.

CECIL, Circuit Judge. This cause is before the Court on appeal from an order of the United States District Court for the Eastern District of Tennessee, Northern Division, concerning the desegregation of the school system of the city of Knoxville, Tennessee.

The appellants were plaintiffs in the District Court and are all Negro citizens of the United States and state of

Tennessee, and residents of the city of Knoxville. They are children who were attending the public schools of Knoxville, at the time this action was begun, and their parents or guardians. The action was brought by the named plaintiffs for themselves, individually, and on behalf of all persons resident of Knoxville, similarly situated.

The appellees were defendants in the District Court and are members of the school board of the city of Knoxville, [fol. 378] together with the superintendent of schools and other administrative officers of the Knoxville school system. They are sued in their official capacities and as individuals.

The parties will be referred to hereinafter, respectively, as plaintiffs and defendants.

The complaint was filed on December 11, 1959, and invoked jurisdiction by virtue of sections 1331, 1343, 2201 and 2202, Title 28 U. S. C. and sections 1981 and 1983, Title 42 U. S. C. By their complaint, the plaintiffs seek orders restraining the defendants from refusing to admit the named plaintiffs to certain schools operated by them as so-called "white" schools, on account of plaintiffs' race or color; for an order declaring the custom, policy, practice or usage of excluding plaintiffs and other persons similarly situated from any schools of the city of Knoxville solely because of race, pursuant to certain constitutional and statutory provisions of the state of Tennessee, to be unconstitutional and void; for a permanent injunction restraining the defendants from operating their schools on a biracial basis, and in addition thereto for an order requiring the defendants to present to the Court a plan "designed to bring about good faith compliance with the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, at the earliest practicable date throughout the Public School System of the City of Knoxville."

The defendants in their answer admit that the schools of Knoxville, at the time this action was begun, were operated on the basis of separate schools for white children and separate schools for Negro children. They say this was in accordance with constitutional and statutory provisions of the state of Tennessee (Art. 11, Sec. 12, Tenn. Const., Secs. 49-1005, 49-1107, and 49-3701, Tenn. Code.);

that they did not feel that they could change this system without the compulsion of law; that the schools for Negroes were excellent and that there was no discrimination against them in the type of education they received; that while there were white teachers for white children and Negro teachers for Negro children, they were paid on the same basis; that since the *Brown* decision, they have studied plans of integration, but that up until this time delay has been well advised. They say they "owe no apologies to anyone, and make none."

After the complaint was filed, the trial judge gave the [fol. 379] defendants until April 8, 1960, to submit a plan of integration. A plan was submitted in accordance with this order and the principal question now before this Court is whether that plan is adequate to comply with the decisions of the Supreme Court.

The plan called "Plan No. 9" provides for school zoning based upon location and capacity of school buildings and admission to schools by reason of residence in a zone without reference to race; discontinuance of racial segregation in steps of one grade a year, beginning with the first grade, effective with the school year, beginning 1960-61, and a system of transfers in which the following will be recognized as some of the valid conditions for transfer: "a. When a white student would otherwise be required to attend a school previously serving colored students only; b. When a colored student would otherwise be required to attend a school previously serving white students only; c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

The plaintiffs objected to the plan for the reasons that, considering the five years that had already elapsed since the *Brown* decision, twelve years was too long a period to accomplish complete desegregation; that the board had not shown that the delay was necessitated by any administrative problems enumerated by the Court in the *Brown* decision; that it deprived Negro students already enrolled in school of an unsegregated education; that it deprived Negro students of an opportunity for education in certain vocational schools and summer courses, and that the trans-

fer plan would operate to perpetuate segregation of the races in the public school system.

The case was tried to the court and a judgment entered on August 26, 1960. By this judgment, the court denied injunctive relief to the plaintiffs and approved the plan as submitted, except "that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them." It was further ordered that the board should put the plan as approved into effect.

[fol. 380] On May 17, 1954, the Supreme Court decided, in *Brown* v. *Board of Education*, 347 U. S. 483, 495 (known as the first *Brown* case) "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." The Court held that segregation of Negro and white children for school purposes on a racial basis deprived Negro children of equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Thereafter, the maintenance of "Negro" schools and "white" schools was a violation of the United States Constitution.

The Court, according to the second *Brown* decision, 349 U. S. 294, realized that the transition required by its first opinion, from a custom and practice of so long standing, could not be easily accomplished and that administrative problems would be encountered which would prevent immediate abandonment of the biracial systems then in effect.

The court said, at p. 299: "Full implementation of these constitutional principles may require solution of varied local school problems." And at p. 300: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles." . . . "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling."

And finally, the classic admonition that the district courts should make such orders as were necessary to admit all students "to public schools on a racially nondiscriminatory basis with all deliberate speed."

It was thereby recognized that some planning would have to be done to adapt a particular local system to the new method of operation and that in the process the rights of some individuals would have to be subordinated to the common good of posterity. In *Boson* v. *Rippy*, 285 F. 2d 43, the Fifth Circuit reversed the District Court when it ordered immediate en masse desegregation, and instructed it to require the board to submit a plan.

We appreciate that in such a transition, as is here involved, emotions are deeply stirred and sensitive feelings touched. But these must give way to the mandates of the Supreme Court. As that Court said in *Cooper* v. *Aaron*, 358 U. S. 1, 16, "law and order are not here to be pre-
[fol. 381] served by depriving the Negro children of their constitutional rights."

It has been nearly eight years since the first *Brown* decision and under the plan before us the first and second grades are now integrated. The evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision. That the operation of schools on a racially segregated basis is a violation of the Fourteenth Amendment and that the constitutional and statutory requirements of the state of Tennessee prohibiting the mixture of races in schools cannot be enforced are no longer debatable or litigable questions. This has been obvious and evident since May, 1954.

The position of the board that it would continue to operate under these unenforcible laws, until compelled by law to do otherwise, does not commend itself to the Court, for the acceptance of a plan that provides for a minimum degree of desegregation. In the second *Brown* case, the Court said, at p. 300: "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." In our judgment, the defendants have not sustained this burden. We do not think

that the twelve-year plan of desegregation adopted at this late date meets either the spirit or specific requirements of the decisions of the Supreme Court.

The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of a such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In *Boson* v. *Rippy*, supra, the court said, at p. 46, the transfer feature "should [fol. 382] be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands.

Some of the named plaintiffs seek orders restraining the defendants from refusing them admission to certain white schools. The district judge denied the request for such orders. The questions presented by this phase of the case are moot as to some of the plaintiffs for the reason that they have now graduated from high school. When the defendants have complied with the mandate of this Court to submit an accelerated plan, looking to the reorganization of the Knoxville schools on a racially nondiscriminatory basis, the questions of individual admission to so-called "white" schools may be moot as to some of the other plaintiffs now in elementary schools.

Judge Taylor wisely withheld approval of the plan insofar as it denied Negro students the right to take the technical and vocational courses offered at Fulton High School. The board should, as he suggested, present within a reasonable time a plan that would permit all Negro students who desire and are qualified to have an opportunity to take the special courses of this high school.

As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan.

We think Judge Taylor was correct in denying injunctive relief and as he so eloquently said: "Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there."

[fol. 383] In conclusion, we affirm the judgment of the District Court in the following respects: the approval of the plan insofar as it pertains to school grades already integrated; the approval of the plan as to items three and four thereof, providing for zoning or districting based upon location and capacity of school buildings and the permission of students to attend schools designated for their zones; the approval of the plan as to transfers subject to it being used for proper school administration purposes and not for perpetuation of segregation; the rejection of the plan so far as it pertains to Fulton High School and the order to the board to resubmit a plan in a reasonable time that will permit Negro students to have the advantage of the special courses of that high school and the denial of injunctive relief.

We modify the judgment of the District Court insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan. It is

not the function of this Court to formulate or dictate to the board a plan for the operation of the Knoxville schools. It is, likewise, not our intention to require immediate total desegregation. We do believe, however, that more grades than contemplated by the board's plan should now be desegregated. In the light of the board's experience with the present plan, it should be enabled to submit an amended plan that will accelerate desegregation and more nearly comply with the mandate of the Supreme Court for "good faith compliance at the earliest practicable date."

The case is remanded to the District Court with instructions to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation, in accordance with the views herein expressed.

[fol. 384] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 385] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14,607

HENRY C. MAXWELL, JR., et al., Plaintiffs-Appellants,

—vs.—

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENN., et al., Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Appendix to Appellants' Brief—Filed August 12, 1961

[fol. 386]

IN UNITED STATES DISTRICT COURT

Civil Docket 2956

HENRY C. MAXWELL, JR., et al.,

—vs.—

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENN., et al.

RELEVANT DOCKET ENTRIES*

9-19-60	Complaint filed.
9-19-60	Motion for Temporary Restraining Order—filed by the Plaintiffs.
9-19-60	Motion for Preliminary Injunction—filed by the Plaintiffs.
9-19-60	Order to Show Cause Why Temporary Restraining Order and/or Preliminary Injunction Should Not Issue—entered by Judge William E. Miller. It is Ordered that the Defendants named herein shall appear at 9:00 A.M. on September 26, 1960 before Judge William E. Miller in U. S. District Courtroom to show cause, etc. * * *
9-26-60	Motion to Dismiss filed by defendants. * * *
9-26-60	Affidavit of J. E. Moss filed by defendants in support of Motion to Dismiss.
9-26-60	Affidavit of Frank White filed by defendants in support of Motion to Dismiss.

[fol. 387]

9-26-60	Affidavit of Melvin B. Turner filed by defendants in support of Motion to Dismiss.
9-26-60	Motion to Strike certain Portions of the Complaint filed by defendants. * * *

* Entries not relevant to this appeal have not been printed.

9–26–60 Answer of defendants filed. * * *

10– 7–60 Order relative to hearing had on September 26, 1960, (1) Motions of plaintiffs for temporary restraining order and/or preliminary injunction be and the same is withheld at this time (2) defendants directed to file with the court, not later than Oct. 19, 1960 a complete and substantial plan which will accomplish complete desegregation of public school system of Davidson County, Tennessee (3) the plaintiffs will be furnished by defendants with a copy of said plan and may file objections thereto not later than October 21, 1960, the plaintiffs except to the action of the Court in withholding action on their motions for temporary restraining order and preliminary injunction.

10–19–60 Report of the County Board of Education of Davidson County, Tennessee, with Exhibit "A"—Report of the Special Committee of the Davidson County Board of Education,—attached, filed by the Defendants. * * *

10–21–60 Specification of Objections to Plan filed by County Board of Education of Davidson County, Tennessee, * * *, filed by the plaintiffs.

11– 9–60 Transcript of the Court's Statement from the Bench and of Proceedings Thereafter on Motion of Defendants to Strike,—filed.

[fol. 388]

11–23–60 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT—entered by Judge William E. Miller. It is accordingly Ordered, Adjudged and Decreed as follows:

(1) That the plan submitted by the County Board of Education of Davidson County, Tennessee is approved, except in the following particulars:

(a) Compulsory segregation based on race is abolished in grades One through Four of

the Davidson County Schools for the Second Semester of the 1960-61 school year beginning January 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Five in September 1961, Grade Six in September 1962, etc.

(b) As respects the summer classes attended by outstanding students, there will be no segregation based on races, and notice of such will be immediately given by the School Board to all teachers in the Davidson County School system, both Negro and white, of the availability of these classes.

(c) The Davidson County School Board will, prior to the beginning of the Second Semester of the 1960-1961 school year, and prior to the beginning of each school year thereafter, give specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes.

[fol. 389] (2) The prayer of the plaintiffs for injunctive relief be, and the same is hereby denied, except with regard to those matters as to which judgment is hereinafter reserved.

(3) Jurisdiction of this case is retained by the Court throughout the period of transition.

(4) Judgment is reserved on the question of the motion to strike and those portions of the motion to dismiss not hereinbefore overruled, and on the matters raised in the complaint which are involved in said motions.

To the foregoing action of the Court in approving the plan submitted by defendants and in denying plaintiffs' prayer for injunctive relief, the plaintiffs except. * * *

11–29–60 Order entered by Judge William E. Miller, Ordering that the Defendants' Motions to Strike and to Dismiss those portions of the Complaint relating to teacher and personnel assignment be and they are hereby overruled, and that the defendants be and they are hereby allowed twenty days from date in which to further plead to the Complaint. The Court reserves judgment as to the substantive questions involved, including the questions of granting injunctive relief, pending a further hearing after the issues have been fully joined between the parties. • • •

12– 2–60 Motion for New Trial and for Appropriate Relief filed by the Plaintiffs.

12–12–60 Motion of plaintiffs for further relief filed. • • •

[fol. 390]

12–13–60 Supplemental. Answer, pursuant to the Court Order entered November 29, 1960,—filed by the Defendants. • • •

1–18–61 Transcript of the Court's Statement from the Bench, on January 10, 1961 at Nashville, Tennessee—filed by the O. C. R. • • •

1–24–61 Findings of Fact, Conclusions of Law and Judgment entered. • • • Ordered that: (1) Relief prayed for in the motion for further relief filed by plaintiffs be and the same is denied, with the exception that the form of the notices to parents in the future are directed to be mailed by defendants to counsel for plaintiffs in advance of mailing, so as to give them sufficient time to file with the Court objections to the form of said notices.

(2) The aforesaid notices to parents will be given to those who are affected by said plan of desegregation heretofore approved by the Court and not to anyone else.

(3) The Motion for a New Trial and for appropriate relief filed by Plaintiffs is overruled and denied.

(4) Injunctive relief with respect to the issues heretofore reserved by the Court concerning assignment of teachers, principals and sustaining personnel in the schools on basis of race is denied at this time; and the Court further reserves ruling with respect to the assignment of teachers, etc., including the right of school children or their parents to raise such question.

[fol. 391] (5) This case will remain on the docket of the Court and the Court will retain jurisdiction during the period of transition, etc.

(6) The Motion to intervene filed in this cause by Porter Freeman is overruled and denied.

To the foregoing action of the Court in denying their motion for further relief and their motion for new trial and for appropriate relief, and in denying the relief prayed for in the complaint with respect to said issues heretofore reserved by the Court, the plaintiffs respectfully except.

2-20-61 Notice of Appeal filed by the Plaintiffs. • • •

2-20-61 Appeal Cost Bond filed by the Plaintiffs. • • •

3-28-61 Order extending time to file record on appeal to and including May 21, 1961, entered.

5-25-61 Order received for entry from the U. S. Court of Appeals for the Sixth Circuit extending time to file record on appeal to and including May 31, 1961.

5-30-61 Transcript of Proceedings, filed (four Volumes)

[fol. 392]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 2956

HENRY C. MAXWELL, JR., and BENJAMIN GROVER MAXWELL, infants, by Rev. Henry C. Maxwell, Sr., and Mrs. Flora Maxwell, their father and mother and next friends,

CLEOPHUS DRIVER, CHRISTOPHER C. DRIVER and DEBORAH D. DRIVER, infants, by Mrs. Annie P. Driver, their mother and next friend,

DEBORAH RUTH CLARK, an infant, by Joe E. Clark and Mrs. Floy Clark, her father and mother and next friends,

JACQUELINE DAVIS, SHIRLEY DAVIS, GEORGE DAVIS, JR., ROBERT DAVIS and RITA DAVIS, infants, by George Davis, Sr., and Mrs. Robbie Davis, their father and mother and next friends,

ROBERT RICKEY TAYLOR, an infant, by Robert Taylor and Mrs. Stella Taylor, his father and mother and next friends,

and

REV. HENRY C. MAXWELL, SR., MRS. FLORA MAXWELL, MRS. ANNIE P. DRIVER, JOE E. CLARK, MRS. FLOY CLARK, GEORGE DAVIS, SR., MRS. ROBBIE DAVIS, ROBERT TAYLOR, MRS. STELLA TAYLOR, Plaintiffs,

[fol. 393] versus

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, and FRANK WHITE, S. L. WRIGHT, JR., E. K. HARDISON, JR., FERRISS C. BAYLEY, E. D. CHAPPELL, AUBREY MAXWELL and OLIN WHITE, Board Members, who together, as such Board Members, constitute the County Board of Education of Davidson County, Tennessee; and

J. E. MOSS, County School Superintendent and/or Superintendent of Public Instruction of Davidson County, Tennessee, Defendants.

COMPLAINT—Filed September 19, 1960

1. (a) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331. This action arises under Section 1 and also the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States; and under the Act of May 31, 1870, Chapter 14, Section 16, 16 Stat. 144, (Title 42, United States Code, Section 1981), as hereinafter more fully appears.

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Ten Thousand ($10,000.00) Dollars.

(b) The jurisdiction of this Court is also invoked under Title 28, United States Code, Section 1343. This action is authorized by the Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13, (Title 42, United States Code, Section 1983) to be commenced by any citizen of the United States or other person within the jurisdiction thereof to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges [fol. 394] and immunities secured by Section 1, of the Fourteenth Amendment, or any other provision of the Constitution of the United States; and by the Act of May 13, 1870, Chapter 14, Section 16, 16 Stat. 144, (Title 42, United States Code, Section 1981), providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, as hereinafter more fully appears.

2. This action is a proceeding under Title 28, United States Code, Sections 2201 and 2202, for a judgment declaring the rights and other legal relations of plaintiffs and all other persons, similarly situated, eligible to attend elementary and secondary schools owned, maintained and operated by the County Board of Education of Davidson County, Tennessee, in and for said County and State, and demanding an injunction, for the purpose of determining and redressing questions and matters of actual controversy between the parties, to-wit:

(a) Whether the custom, policy, practice or usage of defendants in excluding plaintiffs and other persons similarly situated, from elementary and secondary schools

owned, maintained and operated by the County Board of Education of Davidson County, Tennessee, solely because of their race or color, and in operating a compulsory racially segregated school system in and for said County and State, pursuant to Sections 49-3701, 49-3702, and 49-3703, Tennessee Code Annotated, 1955, and that portion of Section 12 of Article 11 of the Tennessee Constitution which makes it unlawful for white and colored persons to attend the same school, and pursuant to any other law, custom, policy, practice, or usage, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

[fol. 395] 3. Plaintiffs bring this action pursuant to Rule 23, (a) (3) of the Federal Rules of Civil Procedure as a class action for themselves and on behalf of all other persons similarly situated, who are so numerous as to make it impracticable to bring them all before the Court and who seek a common relief based upon common questions of law and fact.

4. Plaintiffs are Negroes and are citizens of the United States and of the County of Davidson and State of Tennessee. All adult plaintiffs are parents and/or guardians of the infant plaintiffs, and reside with the infant plaintiffs, in Davidson County, Tennessee. All of the infant plaintiffs are school children, eligible to attend the public schools of Davidson County, and have been attending said schools, and can satisfy all requirements for admission to the public schools maintained and operated by the defendant, County Board of Education, in and for Davidson County, Tennessee, including the schools to which they respectively applied as hereinafter shown.

5. (a) The defendant, County Board of Education of Davidson County, Tennessee, is composed of the following Board Members, the defendants, Frank White, S. L. Wright, Jr., E. K. Hardison, Jr., Ferriss C. Bailey, E. D. Chappell, Aubrey Maxwell, and Olin White, who, together, constitute the County Board of Education of Davidson County, Tennessee, and who are hereinafter referred to as defendant, County Board of Education.

(b) Said defendant, County Board of Education, exists pursuant to the Constitution and laws of the State of Tennessee as an administrative department or agency of the State of Tennessee, discharging governmental functions, and is by law, a body corporate or a continuous body or [fol. 396] entity, and is being sued herein as such corporate or continuous body or entity.

(c) All of said defendants, above named as Board Members of defendant County Board of Education, are citizens and residents of the State of Tennessee, and are being sued herein in their official capacities as such Board Members, and are also being sued herein as individuals.

(d) Defendant, J. E. Moss, is County School Superintendent or Superintendent of Public Instruction of Davidson County, Tennessee and holds office pursuant to the Constitution and laws of the State of Tennessee as an administrative officer of the free public school system of Tennessee. He is a citizen and resident of the State of Tennessee, and is made defendant herein and sued in his official capacity as stated hereinabove, and is also being sued herein as an individual.

6. The State of Tennessee has declared public education a State function. The Constitution of Tennessee, Article 11, Section 12, provides:

> "Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State, being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this Government, to cherish literature and science."

Pursuant to this mandate the Legislature of Tennessee has established a uniform system of free public education in the State of Tennessee according to a plan set out in the [fol. 397] Tennessee Code Annotated, 1955, Sections 49-101 through 49-3806, and supplements and amendments thereto. The establishment, maintenance and administration of the

public school system of Tennessee is vested in a Commissioner of Education, a State Board of Education, County Superintendents of Public Schools, and County and City Boards of Education.

7. The public schools of Davidson County, Tennessee are under control and supervision of defendant, County Board of Education and defendant, J. E. Moss, acting as an administrative department, division or agency, and as an agent of the State of Tennessee. Said County Board of Education is charged and vested with the administration, management, government, supervision, control and conduct of public schools within said County, and is vested with all powers and duties pertaining to, connected with, or in any manner incident to the proper conduct and control of the public schools of said County. Said County Board of Education is under a duty to enforce the school laws of the State of Tennessee; to maintain an efficient system of public schools in Davidson County, Tennessee; to determine the studies to be pursued, the methods of teaching, and to establish such schools as may be necessary to the completeness and efficiency of the school system. Defendant, J. E. Moss, as Superintendent, has the immediate control of the operation of the public schools of said County and is the administrative agent for the defendant, Board of Education, and serves as a member of its executive committee.

8. Plaintiffs allege that the defendants herein, acting under color of the laws of the State of Tennessee and County of Davidson, have pursued and are presently pursuing a policy, custom, practice and usage of operating a com- [fol. 398] pulsory racially segregated school system in and for the County of Davidson, State of Tennessee. The racially segregated school system operated by defendants consists of a primary system of elementary, junior high, and high schools limited to attendance by white children of the County of Davidson. Said schools are staffed by white teachers, white principals and white sustaining personnel. Said white schools are located in various parts of the County and, regardless of location, these schools may be attended by white children only. The defendants also maintain a secondary system of "colored schools" or "Negro

schools" limited to attendance by Negro children. These schools are likewise located in various parts of the County and, regardless of location, are limited to attendance by Negro children. These schools are staffed entirely by Negro personnel; the teachers are all Negroes; the principals are all Negroes; and the sustaining personnel are all Negroes. This compulsory racially segregated school system is based solely upon race and color; attendance at the various schools is determined solely upon race and color and the assignment of personnel is determined solely upon the race and color of the children attending the particular school and the race and color of the personnel to be assigned. A dual set of school zone lines is also maintained. These lines are based solely upon race and color. One set of lines relates to the attendance areas for the Negro schools and one set to the attendance areas for the white schools. These lines overlap where Negro and white school children reside in the same residential area. For many years the defendants have adopted, maintained and enforced, and they still maintain and enforce this custom, policy, practice or usage of compulsory racial segregation in the schools of Davidson County, Tennessee pursuant to [fol. 399] which they have required and are still requiring all Negro children, including the infant plaintiffs, to attend said schools designated exclusively for Negro children.

9. From time to time since 1954 or 1955, Negro citizens and residents of Davidson County have requested defendants to cease operating a compulsory racially segregated public school system in Davidson County, Tennessee, and to comply with the decision of the United States Supreme Court in the School Segregation Cases. Defendants have continued, however, to pursue the policy, practice, custom and usage of operating a compulsory racially segregated school system in Davidson County, Tennessee; and have failed and have refused to formulate or adopt any plan for desegregating the public school system of Davidson County.

10. At the beginning of the school term, that is, to-wit; on 2 September, 1960, the infant plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, presented them-

selves with their parents, and made proper and timely applications for admission to Glencliff Junior High School and/or Antioch High School, but they were denied admission by defendants to said said schools, solely on account of plaintiffs' race or color. On the same date, the infant plaintiffs, Cleophus Driver, Christopher C. Driver, and Deborah D. Driver, presented themselves, together with their mother, and made proper and timely application for admission to the Bordeaux Elementary School. In addition, the plaintiff, Joe E. Clark, father of Deborah Ruth Clark, also presented himself at that time and made proper and timely application for admission of his daughter, the infant plaintiff, Deborah Ruth Clark, to the Bordeaux [fol. 400] Elementary School. All of said plaintiffs were refused and denied admission by defendants to the said Bordeaux Elementary School, solely on account of plaintiffs' race or color. All of said infant plaintiffs reside in the zones of the respective schools to which they applied, and would have been admitted had they been white children. The plaintiffs, Reverend & Mrs. Henry C. Maxwell, Sr. were accompanied by the plaintiff, Mrs. Robbie Davis, whose five minor children, the infant plaintiffs, Jacqueline Davis, Shirley Davis, George Davis, Jr., Robert Davis, and Rita Davis, are presently residing closer to a school designated by the defendants as a "Negro" school. However, Mrs. Davis accompanied Reverend & Mrs. Maxwell, and she and her husband, George Davis, Sr., and their minor children, as well as the plaintiffs, Robert Taylor and wife, Stella Taylor and their minor child, Robert Rickey Taylor, who also is in the zone of and attends a "Negro" school, join in this action for the reason that their said children are being denied their right to enjoy a non-discriminatory public education by reason of the compulsory racially segregated public school system which the defendants are maintaining and operating in and for Davidson County, Tennessee, as more fully shown hereinafter.

(a) Defendants' requirement of compulsory racial segregation imposes unreasonable burdens upon the infant plaintiffs and other Negro children similarly situated, who live near and in the zone of readily accessible schools which

white children living in the same area are permitted to attend, but plaintiffs and all other Negro children are refused admission to these schools and required to travel great distances to "Negro" schools, solely because of their race or color. For instance, the infant plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, who are [fol. 401] just entering Junior High School this year, reside within a radius of two or three miles of Glencliff Junior High School and Antioch High School, to either of which they would be admitted if they were white, but because they are Negroes, they and other Negro children similarly situated, must walk a half mile or more each morning to a school bus pick-up point, where they are picked up and transported twelve miles all the way across town to a "Negro" school, and must make the return trip each evening, arriving home at dusk. Similarly, the Driver and Clark children named hereinabove as infant plaintiffs, and all other Negro children, similarly situated, who reside in their neighborhood, are withing walking distances of the Cumberland Junior High School and the Bordeaux Elementary School, which latter school was destroyed by fire on 9 September 1960, as hereinafter shown; but these children and all other Negro children similarly situated, are required to travel by bus a distance of five or six miles or more to Haynes School, designated by defendants as a "Negro" school. This unnecessary burden imposed upon the infant plaintiffs, and other Negro children similarly situated, solely because of race or color, subjects said children to unwarranted physical and health hazards, depriving them in many instances of opportunities for athletic and cultural development, and reduces their opportunities for educational instruction and study. In addition, it places an unwarranted burden upon the parents of the infant plaintiffs and other Negro children, requiring them to arise in the early hours of the morning in order to get them off to school and depriving said parents, in many instances, of their companionship and services in the afternoon, by reason of the fact that many of them, particularly those residing in the area of the Maxwell children, do not reach [fol. 402] home until late in the evening. Defendants refuse to admit the infant plaintiffs to the schools as aforesaid,

solely on account of their race or color, the defendant, J. E. Moss, having stated explicitly to one or more of the adult plaintiffs that they were denied admission for this reason, and that the Board of Education is committed to a policy of compulsory segregation. As a matter of fact, the defendant, Board of Education, has officially stated its policy of compulsory racial segregation by a motion passed and entered upon the minutes of the Board at a meeting held on 8 September, 1960, which reads substantially as follows:

> "We have fully considered the request of certain Negro citizens who are parents of children in the Davidson County School System to admit 4 children as students in the Bordeaux Elementary School and 2 students to be admitted to Glencliff High School.
>
> Heretofore, numerous substantial Negro citizens of this county have expressed their desire that their children attend Negro schools; and they also expressed their pride in their own schools and confidence in their teachers.
>
> The Negro schools in Davidson County are in excellent condition and most of the schools have been built within the last 10 years and the Negro schools are equal in every respect to the white schools.
>
> The request has been made by the parents of six children from three Negro families. This request was made after the current school year had started and after all plans for transportation, zoning of students, distribution of school books, etc., had been fully completed for the county-wide system.
>
> [fol. 403] It is therefore moved that the Davidson County Board of Education decline the request so made and in making this motion, it is our feeling that we are acting in the best interest of the six Negro children mentioned above."

Plaintiffs aver that the class work in the Davidson County School System, contrary to the foregoing statement of the defendants, began on Tuesday, September 6, 1960, some four days after the plaintiffs had presented them-

selves and made application to the defendants for admission to the schools requested, and were denied. Plaintiffs further aver that some of the adult plaintiffs appeared at the office of the defendant, J. E. Moss, on 31 August, 1960, approximately two days prior to registration on 2 September 1960, and sought an interview with the defendants, at which time, one of the adult plaintiffs stated explicitly that they were there requesting integration of the Davidson County School System. Plaintiffs were informed by said office that they would be given an appointment with the defendant, J. E. Moss, for that purpose on Thursday, 1 September 1960. However, on the last mentioned date, they were further informed by said defendant's office, that he would not see them until Tuesday, 6 September, 1960. Plaintiffs thereupon presented themselves to the respective schools for admission on registration day, 2 September, 1960, as aforesaid.

On the morning of 9 September, 1960, following said action by the Board on 8 September, 1960, the Bordeaux Elementary School was destroyed by fire. Although defendants have not made any public announcement as to the disposition of the exclusively white school population of said school, it is apparent from the defendants' foregoing [fol. 404] policy, that they will continue to operate a compulsory racially segregated school system and that new re-assignment of the students in said school will be made on this basis.

(b) Plaintiffs aver that while some of them sought and seek admission of their children to the respective schools to which they applied as aforesaid, same being within their zones, all of the plaintiffs further insist that the operation of a compulsory racially segregated school system in Davidson County violates rights of the plaintiffs and members of their class which are secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. The compulsory racially segregated school system is predicated on the theory that Negroes are inherently inferior to white persons and, consequently, may not attend the same public schools attended by white children who are superior. The plaintiffs, and

members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior to white teachers, principals and other white school personnel and, therefore, may not teach white children. Thus all of the plaintiffs are affected and injured by defendants' aforesaid policy, practice, custom, or usage, whether they are thereby excluded from a white school nearer their homes, or whether, on the other hand, they are required to attend a school nearer their homes but which is designated and stigmatized as a "Negro" school, [fol. 405] from which all children of other racial extractions are excluded.

11. The defendants rely on the following provisions of the Tennessee Constitution and Statutes, which read as follows:

Constitution of 1870, Act 11, Sec. 12:

". . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . ."

Tennessee Code, 1955, Sections:

"49-3701. Interracial Schools prohibited.—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning. (Acts 1901, ch. 7, sec. 1; shan., sec. 6888a 37; Code 1932, sec. 11395).

"49-3702. Teaching of mixed classes prohibited.—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both white and colored races

in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement, (Acts 1901 ch. 7, sec. 2; shan., sec. 6888a 38; Code 1932, sec. 11396.)

"49-3703. Penalty for violations.—Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall [fol. 406] be fined for each offense fifty dollars ($50.00), and imprisonment not less than thirty (30) days nor more than six (6) months. (Acts 1901, ch. 7, sec. 3; shan., sec. 6888a 39; mod. Code 1932, sec. 11397.)"

12. The infant plaintiffs and all other persons similarly situated, in Davidson County, Tennessee, are thereby deprived of their rights guaranteed by the Constitution and laws of the United States.

Plaintiffs aver that the said constitutional and statutory provisions and all other laws, customs, policies, practices and usages of the State of Tennessee requiring or permitting segregation of the races in public education, fall within the prohibited group which the Supreme Court of the United States holds must yield to the Fourteenth Amendment of the Constitution of the United States, and are of no force and effect.

Plaintiffs therefore aver that the said custom, policy, practice or usage of defendants in excluding plaintiffs and other persons, similarly situated, from elementary and secondary schools, owned, maintained and operated by the County Board of Education of Davidson County, Tennessee, solely because of their race or color, and in operating a compulsory racially segregated public school system in and for said County, pursuant to said constitutional and statutory provisions and any other law, custom, policy, practice or usage of the State of Tennessee requiring or permitting segregation of the Negro and white races in public education, deprives plaintiffs and all others similarly situated of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and

void and affords defendants no legal excuse to deprive plaintiffs of their rights herein prayed.

[fol. 407] 13. Plaintiffs and those similarly situated and affected, on whose behalf this suit is brought, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. They have no plain, adequate or complete remedy to redress the wrongs and illegal acts herein complained of, other than this suit for a declaration of rights and an injunction. Any other remedy to which plaintiffs and those similarly situated, could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury and occasion damage, vexation and inconvenience, not only to the plaintiffs and those similarly situated, but to defendants as governmental agencies.

Plaintiffs aver that as of the date of this complaint, the classes in the public schools of Davidson County have been in session only three days and that there is no reason why, in view of the foregoing circumstances, their children should not be immediately admitted to the said schools on a nondiscriminatory basis this school term. They further aver that they will suffer irreparable injury in the future, unless defendants are restrained by the temporary restraining order and injunction of this Court for the reasons set out hereinabove, and also, for the reason that, as aforesaid, the defendants have explicitly indicated that they intend to continue their compulsory segregation policy; and if the plaintiffs and other Negro children similarly situated, are not granted immediate relief now, they will be subjected to the inherent evil and inequality of compulsory racial segregation in the public schools for an indefinite period of time, and immediate and lasting harm and damage will result not only to them, but also to white children who are thereby being indoctrinated daily with concepts of themselves as a master or superior race, while infant [fol. 408] plaintiffs will be subjected daily to the said indoctrination classifying them as an inferior race.

14. There is between the parties an actual controversy as hereinbefore set forth.

Wherefore, Plaintiffs respectfully pray:

The Court issue forthwith a temporary restraining order against the defendants, immediately restraining and enjoining them and each of them, their agents, employees, servants or attorneys, from refusing to admit the infant plaintiffs to the said Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out hereinabove, or any other public school operated by defendants in and for Davidson County, Tennessee, on account of plaintiffs' race or color, pending further orders of the Court.

The Court issue a preliminary injunction, restraining and enjoining defendants and each of them, their agents, employees, servants or attorneys, from refusing to admit plaintiffs, and other persons similarly situated, to Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out hereinabove, or any other public schools maintained and operated by defendant County Board of Education in and for Davidson County, Tennessee, because of their race or color, pending further orders of the Court.

The Court adjudge, decree and declare the rights and legal relations of the parties to the subject matter here in controversy in order that such declaration shall have the force and effect of a final judgment or decree.

The Court enter a judgment or decree declaring that the custom, policy, practice or usage of defendants in main-
[fol. 409] taining and operating a compulsory racially segregated public school system in Davidson County, Tennessee, and in excluding plaintiffs and other persons, similarly situated, from Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out hereinabove, or any other public schools maintained and operated by defendant County Board of Education in and for Davidson County, Tennessee, solely because of race, pursuant to the above quoted portion of Article 11, Section 12 of the Constitution of Tennessee, Sections 49-3701, 49-3702, and

49-3703 of the Tennessee Code, 1955, and any other law, custom, policy, practice and usage, violates the Fourteenth Amendment of the United States Constitution, and is therefore unconstitutional and void.

The Court issue a permanent injunction forever restraining and enjoining defendants and each of them, their agents, employees, servants or attorneys, from maintaining or operating a compulsory racially segregated public school system in and for Davidson County, Tennessee, and from refusing to admit plaintiffs, and other persons similarly situated, to Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out hereinabove, or any other public schools maintained and operated by defendant, County Board of Education in and for Davidson County, Tennessee, because of their race or color.

In addition to the immediate and preliminary relief prayed hereinabove in behalf of the named infant plaintiffs individually, the plaintiffs pray that this Court also expeditiously enter a decree directing defendants to present a complete plan, within a period of time to be determined by this Court, for the reorganization of the entire [fol. 410] school system of Davidson County, Tennessee, into a unitary, nonracial school system which shall include a plan for the assignment of children on a nonracial basis, the assignment of teachers, principals and other school personnel on a nonracial basis, the drawing of school zone lines on a nonracial basis, the allotment of funds, the construction of schools, the approval of budgets on a nonracial basis, and the elimination of any other discriminations in the operation of the school system or in the school curriculum which are based solely upon race and color. Plaintiffs pray that if this Court directs defendants to produce a desegregation plan that this Court will retain jurisdiction of this case pending Court approval and full and complete implementation of defendants' plan.

Plaintiffs further pray that the Court will allow them their costs herein and such further, other or additional relief as may appear to the Court to be equitable and just.

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee, Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, Suite 1790, New York 19, N. Y., Attorneys for Plaintiffs.

(Duly verified.)

[fol. 411]

IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—
Filed September 19, 1960

Come the plaintiffs, named in the caption hereinabove, and move the Court to issue forthwith a temporary restraining order against the defendants in this cause, immediately restraining and enjoining them and each of them, their agents, employees, servants, or attorneys, from refusing to admit the infant plaintiffs to Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out in the complaint, or any other public school or schools operated and/or maintained by said defendants in and for Davidson County, Tennessee, on account of plaintiffs' race or color, pending further orders of the Court.

And for grounds of said motion, the said plaintiffs specify the matters and things alleged in their Complaint filed herewith, all of which are incorporated herein by reference and made a part of this motion.

Respectfully submitted,

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee, Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, Suite 1790, New York 19, New York, Attorneys for Plaintiffs.

[fol. 412]

IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—
Filed September 26, 1960

Come the plaintiffs, named in the caption hereinabove, and move the Court to issue a preliminary injunction against the defendants in this cause, restraining and enjoining said defendants and each of them, their agents, employees, servants or attorneys, from refusing to admit the plaintiffs and other persons similarly situated, to Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out in the complaint, or any other public school or schools maintained and operated by the defendant County Board of Education of Davidson County, Tennessee, in and for said County and State, because of their race or color, pending further orders of the Court.

And for grounds of said motion, the said plaintiffs specify the matters and things alleged in their complaint filed herewith, all of which are incorporated herein by reference and made a part of this motion.

Respectfully submitted,

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee, Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, Suite 1790, New York 19, New York, Attorneys for Plaintiffs.

[fol. 413] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE WHY TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION SHOULD NOT ISSUE—
September 19, 1960

In the above cause the plaintiffs having filed their verified complaint together with Motions for a temporary restraining order and a preliminary injunction against the defendants, for the purpose of immediately restraining and enjoining them and each of them, their agents, employees, servants or attorneys, from refusing to admit the infant plaintiffs, and other persons similarly situated, to Glencliff Junior High School, Antioch High School, and Bordeaux Elementary School, according to their respective applications as set out in the complaint, or any other public school or schools maintained and operated by the said defendants in and for Davidson County, Tennessee, on account of plaintiffs' race or color, pending further orders of the Court; and said motions being supported by the allegations contained in the complaint properly referred to and made a part thereof.

It is therefore ORDERED that the defendants named in the caption of the complaint in this cause, and each of them, appear before the Honorable William F. Miller, U. S. District Judge, at 9:00 A.M., on Sept. 26, 1960, in U. S. District Courtroom, Nashville, Tennessee, and show cause why the aforesaid temporary restraining order and/or preliminary injunction should not issue.

Wm. E. Miller, U. S. District Judge.

September 19, 1960.

[fol. 414]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 26, 1960

The defendants jointly move to dismiss the complaint filed against them in this cause upon the following grounds:

1. The complaint seeks extraordinary relief and purports to be sworn to, but the jurat of the Notary Public fails to contain any notarial seal, all as required by law.

2. The complaint seeks to attack and have declared unconstitutional and void Article II, Section 12, of the Constitution of Tennessee, and Sections 49-3701 through 49-3703 of the Tennessee Code of 1955, without either the State of Tennessee or its representative, the Attorney General of the State of Tennessee, being made a party thereto.

3. The complaint purports to be brought as a class action by certain infant school children on behalf of all other persons similarly situated without any showing that there are other persons similarly situated who seek to attend any of the public schools of Davidson County, Tennessee, which they are not now attending, or who would be qualified to attend any such schools.

4. The complaint seeks to obtain a reorganization of the entire school system of Davidson County, Tennessee, insofar as teachers, principals and other school personnel are concerned; whereas, no such persons are parties to the complaint.

And the Defendants, and All of Them, Further Move to Dismiss the Complaint Insofar as Extraordinary Relief By Way of Temporary Restraining Orders and/or Preliminary Injunctions for the Reasons That:

1. These plaintiffs are seeking equitable relief of an extraordinary nature and by their own admission have [fol. 415] been guilty of laches in failing to make any application for admission to the schools of Davidson County, Tennessee, which they seek to attend until after all pupil

assignment, school zones, transportation facilities and the like had been determined for the school year 1960-1961.

2. These plaintiffs are seeking equitable relief of an extraordinary nature and have been guilty of laches over the past several years in failing to seek admission to the schools of Davidson County, Tennessee, which they seek to attend and now seek to obtain such admission by means of the exercise of such extraordinary relief through this Honorable Court.

And the Individual Defendants Move to Dismiss the Complaint Insofar as the Same Is Filed Against Them Individually for the Reason:

1. No action on the part of these defendants as individuals has been recited in the complaint as the basis for a complaint on the part of the plaintiffs, and, on the contrary, such action as is complained of is under the allegations of the complaint the official action of such defendants.

Shelton Luton, County Attorney for Davidson County, Tennessee, Davidson County Courthouse, Nashville 3, Tennessee, Harlan Dodson, Jr., 1106 Nashville Trust Building, Nashville 3, Tennessee, Attorneys for Defendants.

[fol. 416]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. E. MOSS IN SUPPORT OF MOTION—
Filed September 26, 1960

J. E. Moss, being first duly sworn, deposes as follows:

That he is sixty-one (61) years of age and is a resident of Davidson County, Tennessee, and has been superintendent of Davidson County Schools since 1949. That as such he is the administrative head of the public schools of Davidson County, Tennessee, and acts under the supervision of the Davidson County School Board.

That the public schools of Davidson County have, throughout his lifetime, been operated on a segregated

basis with separate schools for white and negro students. That neither prior to nor since the decision of the Supreme Court of the United States in 1955 in the case of Brown v. The School Board has any request been made to him or of him by any negro pupil or the parents of any negro pupil in Davidson County, Tennessee, for the operation of the schools of Davidson County on an integrated basis prior to September 2, 1960. That neither has any group of negroes or whites, by petition, letter, verbal communication or otherwise, requested of the Davidson County School Board that the schools of Davidson County be operated on an integrated basis insofar as he is advised and that, in the event any such request had been made, such would have in the normal course of the operation of the School System been communicated to him. That, on the contrary, on more than one occasion delegations of negro pupils, or the parents of negro pupils, have requested, either verbally or in writing, that the School System of Davidson County be continued on a segregated basis. That in September of 1955 the County Board of Education of Davidson County was presented with a petition for a new school building in the Goodlettsville, Tennessee, area, which petition was signed by the officers and practically all members of the Good-
[fol. 417] lettsville Colored P. T. A. That this request contained the express statement, "We do not want integration in Goodlettsville." A copy of this said petition is attached hereto as Exhibit "A" to this affidavit and the original of the same is on file in the office of the Davidson County School Board. That, pursuant to the request contained in said Exhibit "A" and in keeping with the over-all plans of the Davidson County School Board, a new school was constructed in the Goodlettsville, Tennessee, area serving the areas of Ridgetop and Goodlettsville. That in May of 1954, the Davidson County School Board had under consideration the construction of a consolidated school for negroes either in the Neeley's Bend area in the Eleventh Civil District of Davidson County, or in the Hermitage area in the Fourth Civil District of said County. At that time a large delegation of negroes from the Neeley's Bend area appeared before the School Board requesting that the school be built in the Neeley's Bend community and, when they were ad-

vised by the School Board that a new white school had just been built in that area, the group responded, in substance, that they did not want their children to go to school at a white school, but wanted a negro school on a completely segregated basis. That, in other instances, various groups of negroes and individual negroes have stated to affiant and to others in affiant's presence that they did not desire integrated schools, but, rather, wanted the schools continued on a segregated basis.

Affiant further states that the data set forth on the attached sheet as Exhibit "B" to this affidavit correctly reflects the information contained thereon as reflected by the records of the Davidson County Board of Education.

Affiant further states that negro children are housed in better and more modern buildings than white children, [fol. 418] since, for the most part, they are in new units. All of the school buildings housing negro children have been built within the past twelve (12) years excepting the Early School in the Eighth Civil District of Davidson County and a portion of Haynes High School located in the Twelfth Civil District. These latter two units, however, have been modernized and are above average in the County for schools. Affiant further states that all of the facilities in both the negro and white schools are modern and comparable. Affiant further states that negro schools operate on the same fiscal policy as white schools in that the allocation of funds is on a per pupil basis with both races receiving funds under the same formula and that equal opportunities are afforded as to courses of study, text books, instructional material and equipment. Affiant further states that the teacher-pupil ratio for the negro pupils is 29.35 pupils per teacher and the ratio in the white schools is 28.92 pupils per teacher.

Affiant further makes oath that in the spring of each year before the conclusion of the school year, a pre-school spring registration is held in order to give information as to the number of students and location of the same for the next school year. That Henry C. Maxwell, Jr. and Benjamin Grover Maxwell, both of whom are plaintiffs in the instant suit, completed their elementary schooling in the spring of 1960 at the Providence Public School. That dur-

ing the spring registration in 1960 both of these pupils registered at Haynes High School for attendance there during the school year 1960-1961. That Cleophus Driver, Christoper C. Driver and Deborah D. Driver, plaintiffs in the instant case, were students at Haynes Elementary School during the school year 1959-1960 and, having received no advice of their intention to move or change their [fol. 419] schools, their names were carried forward as expected to be in attendance at Haynes Elementary School during the school year of 1960-1961. That the same situation with respect to Deborah Ruth Clark existed as with the Driver children. That the method of anticipation of attendance during the school year 1960-1961 was the same for the children listed as plaintiffs in the instant case as it was for all of the other children in Davidson County, Tennessee, similarly situated. That, in the spring of each year, the principals of each of the schools make their requests or requisitions to the School Board for the books which they will need during the ensuing year and, at that time, make their requests for rooms, temporary housing facilities, when needed, and for their teachers, all for the next school year and, based upon these requests, the Board of Education prepares and submits its request to the County Court for school funds for the next year. Of course, there are instances where students, for various reasons, change from one school to another, but such is not permitted by affiant or the School Board without some justification and any alteration of the planning and programming by any substantial group of students changing schools would completely disrupt and disorganize the school system. Affiant further states that any attempt on his part, or on the part of the Davidson County School System, to change from a segregated school system to an integrated school system on August 31, 1960, or thereafter, without substantial preliminary planning, would have been chaotic in the administration of the school system.

That since the unfortunate incident of the burning of the Bordeaux Elementary School on September 9, 1960, your affiant and the School Board have been making every effort, through the use of makeshift classrooms, repair [fol. 420] work, use of temporary facilities such as churches

and the like, and transportation of pupils to schools operated by the City of Nashville, to furnish facilities for the student body of this school. This situation has created and is continuing to create great confusion, hardship and difficulty on pupils, parents and school officials, and any further problems in the operation and administration of this school at this time would be highly undesirable.

Further this affiant saith not.

J. E. Moss

Sworn to and subscribed before me, this 26th day of September, 1960.

Helen M. Hutchison, Notary Public.

My commission expires: Oct. 19, 1960.

(Seal)

[fol. 421]

IN UNITED STATES DISTRICT COURT

EXHIBIT "A" TO AFFIDAVIT OF J. E. MOSS

Agenda

Goodlettsville, Tenn.
Sept. 12, 1955

County Broad of Ed.

We the parents want a better and more comfortable school in Goodlettsville. We want a consolidated school with Ridgetop, Amqui, & Edenwold communities.

We do not want Integration in Goodlettsville.

We need a janitor for at least five months, since there is not a child in school old enough for the responsibility of the job.

We want cool water in summer months.

We need a new school because it's impossible for one teacher to teach (8) eight grades under present conditions and give our children the attention and justice they deserve

Signed by Goodlettsville Colored P. T. A.

Mrs. Alice Cantrell—pres.
Mrs. Beulah Cartwright—Asst. Sec.
Mrs. Mattie Cartwright Sec.

Mrs. Beatrice Vaughn
Mrs. Lula Joyner
Mrs. Jessie H. Jones
Mrs. Bessie Patton
Mrs. Mamie Washington
Mrs. Bobbie Washington
Mrs. Sadie Bell Cartwright
Mrs. Ester Louise Matthews
Mrs. Mary Elizabeth Mathews
Mrs. Hattie M. Stanton
Mrs. Mary Sue Cantrell
Mrs. Rizzie Mae Joyner
Mrs. Willie Johnson
Mrs. Maud Joyner
Ernest Matthews

[fol. 422]

IN UNITED STATES DISTRICT COURT

EXHIBIT "B" TO AFFIDAVIT OF J. E. MOSS

DATA ON DAVIDSON COUNTY SCHOOLS

Total number of white children	44,415
Total number of negro children	2,348
Total number of County students	46,763
Total number of negro elementary schools	7
Total number of negro high schools	1
Total number of white elementary schools	62
Total number of white high schools	16
Percentage of white children	95
Percentage of negro children	5
Number of white teachers	1,536
Number of negro teachers	80
Number of white central office supervisors	20
Number of negro central office supervisors	1

Percentage of negro central office supervisors 5

Trend of population for the last five years:

	White	*Negro*	*Total*
1956	35,270	2,001	37,271
1957	37,551	2,032	39,583
1958	40,152	2,089	42,241
1959	42,614	2,281	44,895
1960	44,415	2,348	46,763

Percentage increase in the last five years—white 26
Percentage increase in the last five years—negro 17

* Average salary 1959-60

Negro women	$4,665.30
White women	$4,380.97
Negro men	$4,849.96
White men	$4,529.35

* Taken from annual report to State Department

[fol. 423]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRANK WHITE IN SUPPORT OF MOTION—
Filed September 26, 1960

Frank White, being duly sworn, deposes and says:

That he is a resident of Davidson County, Tennessee, and has been all his life; that he served as Chairman of the Davidson County School Board from September of 1958 until September 22, 1960, and has served as a member of the Davidson County School Board for more than twenty years.

That at no time prior to September 2, 1960, was any request ever communicated to the Davidson County School Board to his knowledge, either formally or informally, for a desegregation of the Public School System of Davidson County, and that if such had been communicated he would probably have known of it and, during the last two years as Chairman of the School Board, would have been the

person on the School Board to whose attention such would have been directed. That plans for the assignment of teachers, pupils, books, transportation facilities and housing facilities for a school year are made in the spring next preceding the school year and that any attempt to make a complete change in the same at the beginning of the school year as would be necessitated by desegregation of the schools would be practically impossible without a complete disruption of the entire school program.

That rather than there being requests for desegregation of the School System, the only communications which have been addressed to the School Board by either negroes or whites have been requests for a continuation of segregated schools. That two specific instances of such requests were in connection with the request of the Neeley's Bend group of negroes and the Goodlettsville Colored P. T. A., both [fol. 424] of which are correctly reflected in the affidavit of J. E. Moss, which is adopted as to these particulars by affiant.

Affiant further makes oath that any attempt to evolve a plan of desegregation of the Davidson County Public School on an orderly basis would require substantial planning, data accumulation and the like by the School Board and its staff and would consume a several months' period of time.

Further affiant saith not.

FRANK P. WHITE

Sworn to and subscribed before me, this 26th day of September, 1960.

Helen M. Hutchison, Notary Public.

My commission expires: Oct. 19, 1960

(SEAL)

[fol. 425]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MELVIN B. TURNER IN SUPPORT OF MOTION—
Filed September 26, 1960

Melvin B. Turner, being duly sworn, deposes and says:

That he is forty-five (45) years of age, is a resident of Davidson County, Tennessee, and is transportation supervisor for the Davidson County Schools. That as such it is his duty and responsibility to proxide public school bus transportation for all pupils attending Davidson County Public Schools who are eligible for or require such public transportation. That the Davidson County School System operates ten (10) routes serving negro school children and eighty-seven (87) routes serving white school children. That the percentage of negro children transported by public school buses of the Davidson County system is 55% and that of white children transported by such system is 48% of the total respective enrollments.

Affiant further states that, by reason of the minimum distance requirement for public school bus transportation, children living several miles from school have an advantage over those living near the school in that a child living less than one and one-quarter miles from school must walk or furnish his own transportation while those living farther than said distance are furnished public transportation by the County School System. That a child living ten or twelve miles from school is delivered in a safe, modern bus in approximately the same time it would take a child living a mile from school to walk the distance; that the child on the bus is protected from the traffic hazards to which the pedestrian child would be subjected.

That affiant knows where the plaintiffs Maxwell reside, which residence is approximately four-tenths of a mile from Nolensville Road and up a dead-end street; that the [fol. 426] County public school bus which transports white students to Antioch High School would use the same pick-up point were there any white students to pick up at this corner where infant plaintiffs Maxwell take the negro school bus.

That even though the distance from plaintiffs Maxwells' said residence to Haynes High School is greater than that to Antioch High School, the actual time consumed en route by bus is approximately the same; that this results from the fact that the route travelled by the bus to Haynes High School is more direct and requires fewer stops than that to Antioch High School.

That the infant plaintiffs Driver and Clark live approximately one-mile from Bordeaux Elementary School, which fact would preclude them from being eligible for public school bus transportation; that said infant plaintiffs Driver and Clark, in riding the County School System bus from their home to Haynes High School, as they have been doing, consume no more than the amount of time which it would take them to walk from their said residence to Bordeaux Elementary School.

Further this affiant saith not.

MELVIN B. TURNER

Sworn to and subscribed before me, this 26th day of September, 1960.

Helen M. Hutchison, Notary Public.

My commission expires: Oct. 19, 1960

(SEAL)

[fol. 427]

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE CERTAIN PORTIONS OF THE COMPLAINT—Filed September 26, 1960

The defendants, and each of them, move to strike certain portions of the complaint as follows:

1. The defendants move to strike that portion of Paragraph 10 of the complaint which reads as follows:

"The plaintiffs, and members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and

color of the children attending a particular school and the race and color of the person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that Negro teachers, Negro principals and other Negro school personnel are inferior to white teachers, principals and other white school personnel and, therefore, may not teach white children."

2. The defendants move to strike that portion of the complaint set forth as a part of the sixth ground of relief asked and specifically being that part reading as follows:

"which shall include . . . the assignment of teachers, principals and other school personnel on a nonracial basis."

Shelton Luton, County Attorney for Davidson County, Tennessee, Davidson County Courthouse, Nashville 3, Tennessee, Harlan Dodson, Jr., 1106 Nashville Trust Building, Nashville 3, Tennessee, Attorneys for Defendants.

[fol. 428]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed September 26, 1960

The defendants, and each of them, for answer to the complaint filed in this cause and answering say:

1, 2 and 3.

The defendants admit the averments of Sections 1, 2 and 3 of the complaint.

4.

Defendants assume that the allegations of Section 4 of the complaint are true, but neither admit nor deny the averments since they are without sufficient information to respond thereto.

5.

These defendants admit the allegations of Section 5 of the complaint.

6.

These defendants admit the factual averments of Section 6 of the complaint, but neither admit nor deny the plaintiffs' conclusions based thereon.

7.

These defendants admit the allegations of Section 7 of the complaint.

8.

These defendants admit that they are and have been operating racially segregated schools as the school system of Davidson County, Tennessee, but they deny that the Negro schools are a secondary system of schools. Subject [fol. 429] to the explanations and exceptions hereinafter set forth, these defendants admit the other allegations of Section 8 of the complaint.

9.

These defendants expressly deny the allegations of the first sentence of Section 9 of the complaint, and, on the contrary, would show to the Court that the requests which they have had from Negro citizens and residents of Davidson County prior to September 2, 1960, have been for a continuation of racially segregated schools.

10.

These defendants admit that on September 2, 1960, the infant plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, presented themselves with their parents and made application for admission to the Glencliff Junior High School, but these defendants deny that such application was made timely or that it was made to the Antioch High School and deny that they could have been admitted to the Glencliff Junior High School, whether white or Negro, but admit that they were denied admission to the Glencliff Junior High School by reason of race or color. These plaintiffs were seeking admission to the ninth grade of Glencliff Junior High School. These defendants further

admit that the infant plaintiffs, Cleophus Driver, Christopher C. Driver and Deborah D. Driver, presented themselves with their mother and made application for admission to the Bordeaux Elementary School, Cleophus Driver seeking to enter the sixth grade, Christopher C. Driver seeking to enter the fourth grade and Deborah D. Driver seeking to enter the second grade, but they deny that such application was timely. These defendants further admit [fol. 430] that the plaintiff, Joe F. Clark, presented himself at the Bordeaux Elementary School and sought admission of his daughter, Deborah Ruth Clark, to the fifth grade thereof, but they deny that this application was timely. These defendants are not advised as to the children of the plaintiff, Mrs. Robbie Davis, or as to the child of Rebert Taylor and wife, Stella Taylor, but insofar as they are advised, none of these said parties have made any application or request to attend any of the public schools of Davidson County, other than those which they are now attending.

In this connection these defendants would show to the Court that at the schools referred to herein, as well as other schools in the Davidson County School System, there is a preschool registration in the Spring of each year before the conclusion of the school year, and that the purpose of the same is to afford the school authorities data on which to complete the formulation of their plans for assignment of teachers, classrooms, pupils, books and the like for the next ensuing year. Any or all of these plaintiffs could have made application at the time of such preschool registration, and while these defendants admit in all frankness that they would not have been admitted to the so-called white schools on an integrated basis, they would show to the Court that it would have given to these defendants an opportunity to make orderly plans for the assignment of such pupils as it became necessary.

Further answering the allegations of this Section of the complaint, these defendants deny the fanciful allegations that compulsory racial segregation imposes unreasonable burdens upon the infant plaintiffs and other Negro children similarly situated in that they are subjected to unwarranted physical and health hazards, are deprived of oppor-

tunities for athletic and cultural development, that their [fol. 431] opportunity for educational instruction and study is reduced or otherwise. On the contrary and specifically, these defendants would show to the Court that if the plaintiffs, the Maxwell children, were attending Antioch High School they would still have the same walk each morning to the school bus pick-up point, and in like manner since the school bus transportation afforded them presently is direct transportation without the necessity of frequent stops, they leave home and arrive home at approximately the same time as white children attending Antioch High School. In similar manner, the Driver and Clark children named as infant plaintiffs would be deprived of school bus transportation if they attended Bordeaux Elementary School, and rather than imposing unnecessary burdens upon these plaintiffs, they are presently afforded safe transportation, free from the hazard of walking along heavily traveled thoroughfares, and actually in most instances requiring less transportation time.

These defendants do not admit the conclusion stated by the plaintiffs as respects the interpretation of the policy set forth in the minutes of the Board of Education of September 8, 1960, but do admit that the Board has followed and is following a policy of racial segregation for the reason that such has been the requests of all Negroes who have made their wishes known to the Board prior to September 2, 1960. While these defendants admit that class work was not commenced in the school system until September 6, 1960, they deny that the statement of the Board set forth in its quoted minutes is incorrect, and would show to the Court that the current school year had commenced with the registration on September 2, 1960, and that plans for transportation, zoning of students, distribution of school books and the like for the county-wide system is [fol. 432] done in the Spring of the year; at which time each school principal makes his request for books and his requests for rooms, teachers and other facilities and at which time plans are prepared for student transportation, all of which would have been completely disorganized if the plan of school segregation were suddenly discontinued on September 2, 1960, and these defendants would show to

the Court that such action by either the defendant, J. E. Moss, or the School Board, at that time would have resulted in chaos.

These defendants admit that insofar as they are advised by the office personnel of the Board of Education an attempt was made by some persons, including some of the adult plaintiffs, to see the defendant, J. E. Moss, on August 31, 1960, and/or September 1, 1960, but at that time the defendant, J. E. Moss, was so busily engaged in service training organization for all teachers and other administration duties necessary to the commencement of school that it was impossible for him to see such persons at that time.

These defendants further admit that on the morning of September 9, 1960, a major portion of the Bordeaux Elementary School was destroyed by fire, and these defendants would show to the Court that such has caused great disruption in the operation of the Bordeaux Elementary School, but they have managed to use the remaining facilities and some repairs thereon to house some of the students, that others are being sent to other schools and that any further imposition of a change in the orderly operation of this school at this time would only increase the chaos and disruption resulting from this unfortunate incident.

These defendants further admit that teachers, principals and other school personnel have been assigned in accordance with what the School Board deemed would be in the best interest of the Board, the teachers, the schools and [fol. 433] the pupils, but they deny that such assignments have been based on any principle of superiority and inferiority, as evidenced by the fact that the average salary for Negro women in the Davidson County School System during the school year 1959-1960 was $4,665.30, as contrasted with that of white women of $4,380.97; and during the same period the average salary for Negro men in the School System was $4,849.96, while that for white men was $4,529.35; all of which appears on the records on file with the State Department of Education of the State of Tennessee.

11.

These defendants admit the allegations of Section 11 of the complaint.

12.

These defendants deny the arguments and conclusions of the pleader set forth in Section 12 of the complaint, but admit that it is proper and would be proper for this Court to require of these defendants, as it has of other defendants similarly situated, the presentation of a plan for orderly pupil desegregation of the Davidson County School System where desired by Negro students.

13.

These defendants deny the allegations of Section 13 of the complaint.

14.

These defendants admit the allegations of Section 14 of the complaint insofar as it pertains to some of the parties plaintiff but denies that there is an actual controversy as between all parties plaintiff and the defendant and denies [fol. 434] that there is an actual controversy as to all matters set forth in the complaint.

15.

These defendants aver, as heretofore set forth, that prior to September 2, 1960, they had had no request for school desegregation in the county system of Davidson County, and, on the contrary, as heretofore set forth, aver that their requests have been to the contrary. Now that they have been faced with a request for such pupil desegregation, they aver that they are and will proceed in good faith and with all reasonable promptness to implement the principles announced by the Supreme Court of the United States in May of 1955 in the case of *Brown* v. *Board of Education of Topeka, Kansas.* These defendants aver that this decision recognized as a fact that there are complexities and obstacles demanding that the situation be studied and an intelligent plan formulated consistent with the various public and private interests involved. They aver that they and their predecessors in office have created and established and are presently maintaining a public school system of high quality with facilities afforded Negro pupils equal to or

better than those afforded white pupils. Presently there are 44,415 white children attending the Davidson County public schools and 2,348 Negro children attending such schools; presently there are 7 Negro elementary schools and one Negro high school and 62 white elementary schools and 16 white high schools; there are 1,536 white teachers and 80 Negro teachers, 20 white central office supervisors and one Negro central office supervisor. The percentage of white children is approximately 95, as contrasted with only 5 per cent Negro children, and the percentage of white teachers [fol. 435] is 95, as contrasted with 5 per cent Negro teachers, and the percentage of white central office supervisors is 95, as contrasted with 5 per cent Negro central office supervisors. There are 10 bus transportation routes serving Negro children and 87 such routes serving white children, with the result that approximately 10 per cent of the bus transportation routes serve Negro children. Negro pupils are housed in better and more modern buildings than white children, since for the most part the Negro school buildings are new, and all of the cafeterias in both the Negro and white schools are modern and comparable; further school funds are allocated on the same per pupil basis to both Negro and white schools, both races receiving funds under the same formula and both races have equal opportunity as to courses of study, text books, instructional material and equipment.

Wherefore, these defendants aver that there is no emergency situation existing requiring the exercise of any extraordinary relief from this Court, but, on the contrary, these proceedings should be handled in the deliberate manner heretofore recognized by the courts as being in compliance with the principles enunciated by the Supreme Court of the United States.

16.

Any allegations of the original complaint not hereinbefore admitted, explained or denied are here and now expressly denied.

[fol. 436] And now having fully answered, these defendants pray that they be hence dismissed, or in the alter-

native for further orders of the Court consistent with the equities of the case and the laws of the United States and the State of Tennessee.

Shelton Luton, County Attorney for Davidson County, Tennessee, Davidson County Courthouse, Nashville 3, Tennessee, Harlan Dodson, Jr., 1106 Nashville Trust Building, Nashville 3, Tennessee, Attorneys for Defendants.

[fol. 437]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF HEARING, SEPTEMBER 26, 1960

J. E. Moss, called as a witness by the plaintiffs for cross-examination on his affidavit, being first duly sworn, was examined and testified as follows:

Cross examination on affidavit.

By Mr. Williams:

• • • • • • • •

Q. Mr. Moss, you do have complete segregation throughout, do you not?

A. Yes, sir.

Q. You do designate White schools and Negro schools?

A. Yes.

Q. You have White teaching personnel in White schools and White supervisory personnel in White schools and Negroes in Negro schools?

A. Yes.

Q. Is that right?

A. That's correct.

Q. You wouldn't place a Negro teacher in a White school, would you?

A. We haven't.

Q. It would be against the policy of the Board to do that, wouldn't it?

A. It would.

Q. Why, sir?

A. Because we have been operating on a segregated basis.

• • • • • • •

Q. If they had moved farther away from that school, closer to another, they would have been transferred, wouldn't they? So that the fact that they were registered out at Haynes had nothing to do with their denial of admission. It was the policy of segregation that caused it?

[fol. 438]

IN UNITED STATES DISTRICT COURT

ORDER—October 7, 1960

This cause came on to be heard the 26th day of September, 1960 before the Honorable William E. Miller, District Judge, on the entire record and especially upon the motions filed by defendants to dismiss and to strike certain portions of the complaint, the affidavits and exhibits filed with said motions, the testimony of witnesses heard in open court, and upon argument and statements of counsel thereon, from all of which the Court finds, holds and orders as follows:

1. The first ground of the motion to dismiss relating to omission of notarial seal on the verification of the complaint is well taken, but the notary public being Avon N. Williams, Jr., one of the attorneys for plaintiffs, who stated to the Court in open court that omission of said seal was inadvertent, therefore, upon application of said attorney, the complaint was and is hereby allowed to be amended, and said defect cured, by said attorney affixing his official notarial seal forthwith to the verification on the original complaint filed in this cause.

2. All other grounds of defendants' said motion to dismiss, except the fourth ground thereof, are not well taken and should be and the same are hereby overruled.

3. It is unnecessary at this time to rule upon the said fourth ground of defendants' motion to dismiss and upon

their motion to strike certain portions of the complaint; and the Court therefore reserves judgment upon said matters.

(Seal)

October 7, 1960

[fol. 439] Thereupon the cause came on to be further heard by the Court upon the verified complaint as amended, the motions filed by the plaintiffs for a temporary restraining order and preliminary injunction against the defendants, the order heretofore entered by the Court directing the defendants to appear and show cause why said temporary restraining order and/or preliminary injunction should not issue, the testimony of witnesses heard in open court, the statements and argument of counsel, and the entire record, from all of which the Court finds, holds and orders as follows:

1. That action by the Court upon the motions of plaintiffs for temporary restraining order and/or preliminary injunction against the defendants, should be and the same is withheld at this time.

2. That the defendants should be and they are hereby directed to file with the Court, not later than October 19, 1960, a complete and substantial plan which will accomplish complete desegregation of the public school system of Davidson County, Tennessee in compliance with the requirement of the Fourteenth Amendment to the Constitution of the United States.

3. The plaintiffs will be furnished by defendants with a copy of said plan, and may file any objections thereto not later than October 21, 1960; and hearing on such objections will be held before this Court at 9:00 A.M. on October 24, 1960.

[fol. 440] The plaintiffs except to the action of the Court in withholding action on their motions for temporary restraining order and preliminary injunction.

Wm. E. Miller, District Judge.

Approved as to form:

Z. Alexander Looby, Avon N. Williams, Jr., Some of Attorneys for Plaintiffs.

Shelton Luton, Harlan Dodson, Jr., Attorneys for Defendants.

Attest: A True Copy

John O. Anderson, Clerk, U. S. District Court, Middle District of Tennessee, By K. D. Hace, D. C.

(Seal)

October 7, 1960

[fol. 441]

IN UNITED STATES DISTRICT COURT

REPORT OF THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE—Filed October 19, 1960

The defendants herein file this report pursuant to the order of this Court of September 26, 1960:

1. The defendant, County Board of Education of Davidson County, Tennessee, appointed a special committee of its membership, to-wit, Ferris C. Bailey, Frank White and S. L. Wright, Jr., to work in conjunction with the staff of said Board of Education in compiling a complete and substantial plan to accomplish complete desegregation of the public schools system of Davidson County, Tennessee; and this said committee, in conjunction with the staff, made such study, compiled such plan and presented the same to the County Board of Education of Davidson County, Tennessee, on October 18, 1960.

2. After due consideration, the said County Board of Education of Davidson County, Tennessee, adopted said plan as presented by its special committee on October 18, 1960, and presents the same to this Honorable Court as its plan, in compliance with the order of this Court.

3. A copy of said report as adopted by the County Board of Education of Davidson County, Tennessee, is at-

tached herewith as Exhibit A to this report and made a part hereof just the same as if fully copied therein.

Shelton Luton, County Attorney for Davidson County, Tennessee, Davidson County Courthouse, Nashville 3, Tennessee, Harlan Dodson, Jr., 1106 Nashville Trust Building, Nashville 3, Tennessee, Attorneys for Defendants.

[fol. 442]

IN UNITED STATES DISTRICT COURT

EXHIBIT "A" TO REPORT OF BOARD

REPORT OF THE SPECIAL COMMITTEE OF THE DAVIDSON COUNTY BOARD OF EDUCATION

The special committee of the Davidson County Board of Education appointed to study and present to the Board a feasible plan for the orderly integration of the public schools of Davidson County, Tennessee, under the jurisdiction of the Davidson County Board of Education makes the following report:

1. This committee has consulted with the members of the staff who have made available to it all the research data which they were able to accumulate within the time allowed. In addition, the members of the committee, as well as the members of the staff, both since the date of the hearing in the United States District Court and prior thereto, have discussed with parents and teachers various approaches which might be made to the problem. Further, your committee has met with and consulted with its legal counsel and discussed with its legal counsel all various possible plans for such integration.

2. Among other plans which the committee has considered is the so-called Nashville Plan, which to date has worked with a minimum of difficulties since being approved by the United States District Court for the Middle District of Tennessee. The Nashville Plan has likewise been approved in other courts and other communities where it has

been employed. Other plans calling for more expeditious integration, or integration at higher levels at the commencement of the plan, have resulted in community disturbances, disciplinary problems, property loss and multiple administrative difficulties. This committee from its study has recognized that in many respects the problem of effec-
[fol. 443] tuating a satisfactory plan is more difficult in the Davidson County school system than it was in the school system of the City of Nashville. Some of the factors which bring this about are that in the City of Nashville there was a great concentration of Negro population around the schools in the City of Nashville serving only Negroes prior to the adoption of the plan, whereas in Davidson County the various areas primarily populated by Negroes are greatly scattered and are not necessarily located near to a school which has been used for the purpose of serving only Negro students in the past. As a result of this factor, a greater percentage of the schools of the Davidson County system will be affected than was true in the City of Nashville system.

Another highly important factor which makes the problem more difficult in the County system than in the system of the City of Nashville is the fact that there has been a tremendous increase of the school population in Davidson County over the past several years, with the result that all or practically all of the facilities in the County system are crowded or overcrowded and more than 70 portable buildings are presently in use in order to accommodate the pupil population; even though several new schools have been opened each year for a period of fifteen years. Such a situation was not true in the City system at the time an attempt was made to integrate the schools so that the assignment of students was not complicated by the lack of physical facilities. Similarly, the teacher load in the County system in all of the schools is at a peak, which situation was not true in the City system, and this further complicates the assignment of pupils.

The County school system has operated a transportation system for all students living as much as 1¼ miles away from the school attended. Such has never been true in the
[fol. 444] City system. Most of the buses operating in the

County transportation system are presently operating at peak capacity, with the buses averaging about three trips per day. The bus driver is charged with the responsibility, not only of driving the bus safely in crowded traffic, but of seeing to the safety of the students as they enter or are discharged from the bus, and likewise is charged with all discipline on the bus. Any factor which creates a greater disciplinary problem makes more hazardous the operation of the bus by the one driver and thus the problem of transition from a segregated to an integrated system is further complicated in the County system.

Your committee also gave consideration to the emotional impact upon the children of both races and concluded from its observations, studies and contacts with others that the emotional impact would be greater upon the pupils of both races in the County system than it was in the City system because in the City the two races have lived closer together and been associated together because of such proximity of residences than was true in the County, where the population is scattered.

In spite of the various factors making it more difficult to apply the Nashville Plan in the County system, your committee after giving consideration to all possible plans, concluded that such was probably the only plan which would work. Such a plan would permit the young students to adjust themselves to one another at an age where there is no resentment or little resentment. Discipline is a greater problem with older children in any case and to begin at higher grade levels than the first grade would cause disciplinary problems difficult of solution and probably would even lead to violence. Further, since transportation is involved in the County system, there would be less chance [fol. 445] of disturbance on the school buses with the first grade students than with older children while in route to and from school, and this would permit the bus driver, who has the great responsibility of watching out for the safety of the students while loading and unloading and also coping with the traffic problems that face him on the crowded highways, to be required to devote less time as a peace officer while attempting to carry out the other duties.

Your committee further gave consideration and made study of when the plan should be commenced and concluded, based upon all factors, that certainly it should not commence prior to September 1, 1961. The school system is now approximately two months under way in the 1960-61 school year and is operating on a segregated plan, as it has historically done. Any change of organization or plan at this time would cause confusion and disruption of classes, together with a loss of valuable teaching time. In addition, it is the policy of the system not to force first grade students to change schools, even after the first month of the term, although the family moves the residence to another zone because of the emotional impact of changing schools during a school year, which fact has even been recognized by the Legislature of the State, and frequently recognized by the school personnel and the parents in cases not involving the segregation question. In addition, the change to an integrated system will necessarily cause some anxiety on the part of parents and students and a period of several months will be needed to institute a program of orientation to this change.

From a study of the situation in the City of Nashville and elsewhere, it has been found that under the plan requests for transfer are to be anticipated, which requests require time to screen and process, and this can be done [fol. 446] more efficiently and in less time and with less confusion between the Spring registration and the beginning of the Fall Term in September of 1961.

Two other factors in this connection were considered of major importance. One was that the school at Bordeaux, one of the schools where Negro children made application for enrollment, has since been destroyed by fire, and the community is being cared for in a makeshift way until a new building can be constructed. This is an additional burden on the physical facilities of the system, including the transportation system, during this emergency period. The Antioch School, at which application has been made, is the most overcrowded school in the entire system, and at this time the addition of other students to that school would for all practical purposes be a physical impossibility. This committee gave consideration to the fact that the children who

are applying are not the victims of hardship because the time consumed in traveling to Antioch by bus is as much as the time consumed presently by such applicants in going to Haynes High School because of the necessary stops made on the Antioch route, whereas the bus makes fewer stops and follows a more direct route to Haynes School.

Considering all of these factors, your committee recommends the following plan:

PLAN

1. Compulsory segregation based on race is abolished in Grade One of the Davidson County Schools for the scholastic year beginning in September 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Two in September 1962, Grade Three in September 1963, Grade Four in September 1964, etc.

[fol. 447] 2. A plan of school zoning based upon location of school buildings, transportation facilities and the most recent scholastic census, without reference to race, will be established for the administration of the first grade, and other grades as they are desegregated according to the gradual plan.

3. Students entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may become necessary in particular cases.

4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration.

5. The following will be regarded as some of the valid conditions for requesting transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only.

b. When a colored student would otherwise be required to attend a school previously serving white students only.

c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race.

[fol. 448] 6. A plan of pupil registration to be held each Spring to aid in formulating necessary arrangements for the opening of schools in the Fall, such as available room, teaching aids, textbooks, pupil immunizations, zoning, and transportation facilities, will be continued.*

7. Transportation will be provided to all students that are eligible for bus service.*

[fol. 449]

IN UNITED STATES DISTRICT COURT

SPECIFICATION OF OBJECTIONS TO PLAN FILED BY COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY—
Filed October 21, 1960

The plaintiffs, Henry C. Maxwell, Jr., et al., respectfully object to the plan filed in the above entitled cause on or about the 19th day of October, 1960, by the defendant, County Board of Education of Davidson County, Tennessee, and specify as grounds of objection the following:

1. That the plan does not provide for elimination of racial segregation in the public schools of Davidson County "with all deliberate speed" as required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

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* This has been done for years.

2. That the plan does not take into account the period of over six (6) years which have elapsed during which the defendant, County Board of Education of Davidson County, has completely failed, neglected and refused to comply with the said requirements of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. That the additional twelve (12) year period provided in said plan is not shown to be "necessary in the public interest" and "consistent with good faith *compliance* at the earliest practicable date" in accordance with the said requirement of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. That the defendants have not carried their burden of showing any substantial problems related to public school administration arising from:

[fol. 450] a) "the physical condition of the school plant";

b) "the school transportation system";

c) "personnel";

d) "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis";

e) "revision of local laws and regulations which may be necessary in solving the foregoing problems";

as specified by the Supreme Court in *Brown* v. *Board of Education* (May 31, 1955) 349 US 294, 75 S Ct 753, 99 L Ed 653, which necessitate the additional time contemplated by their plan for compliance with the constitutional requirement of a racially unsegregated public educational system.

5. That the plan is manifestly a substantially exact copy of the "Nashville Plan" adopted by defendants without reference to the local conditions in Davidson County as a minimum plan predicated on subjective and mental fears of the defendants as to possible community hostility or

friction among students, and is not supported by a showing of any objective administrative conditions or problems which legally justify its complete deprivation of the constitutional rights of plaintiffs and all other children now in school to an integrated education by projecting the bar of segregation into the next twelve years.

6. That the plan forever deprives the infant plaintiffs and all other Negro children now enrolled in the public schools of Davidson County, of their rights to a racially [fol. 451] unsegregated public education, and for this reason violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the plan wholly ignores and fails to comply with the statement of this Court from the Bench on 26 September, 1960, holding that the individual plaintiffs "have been denied their constitutional and legal rights", and suggesting that they be accorded these rights by defendants voluntarily rather than by court order, in that under the plan the individual plaintiffs can never be admitted to an integrated school and are forever deprived of their rights to a racially integrated public education in Davidson County.

8. That the plan fails to take into account recent annexation by the City of Nashville of a large area of surrounding Davidson County resulting in the public schools of said County becoming a part of the City of Nashville School System, which latter School System is now desegregated from the first through the fourth grades.

9. That the plan fails to take into account the rights of the infant plaintiffs and other Negro children similarly situated and forever deprives them of their rights to enroll in and attend any technical or other special or vocational schools, summer courses and educational training of a specialized nature as to which enrollment is not based on location of residence.

10. Paragraph five (5) of the plan violates the due process and equal protection clauses of the Fourteenth

Amendment to the Constitution of the United States in that [fol. 452] said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operate to perpetuate racial segregation.

11. That the plan contemplates continued maintenance and operation by defendants of "Negro" and "white" schools substantially designated by race, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, in that it fails to make any provision for the reorganization of the entire County School System into a unitary, nonracial school system so as to include a plan for the assignment of teachers, principals and other school personnel, as well as school children, on a nonracial basis; for the allotment of funds, construction of schools and approval of budgets on a nonracial basis; and for the elimination of all other discriminations in the operation of the school system or in the school curriculum which are based solely on race and color.

WHEREFORE, the plaintiffs pray:

1. That the Court grant their motions for temporary restraining order and preliminary injunction so as to require the immediate admission by defendants of the individual plaintiffs to the public schools of Davidson County, Tennessee on an unsegregated basis.

2. That the declaratory and permanent injunctive relief prayed for in their complaint be granted, said injunctive relief to be effective not later than the beginning of the Spring Semester or Term of the public schools of Davidson County in January, 1961.

[fol. 453] 3. That the defendants be required by the Court to reorganize the entire County School System of Davidson County, Tennessee into a unitary nonracial school

system, including all of the matters prayed for in the sixth prayer of the complaint filed in this cause.

Respectfully submitted,

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee, Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, Suite 1790, New York 19, New York, Attorneys for Plaintiffs.

[453A]

IN UNITED STATES DISTRICT COURT

Excerpts From Transcript of Hearing, October 24, 1960

* * * * * * *

J. E. Moss, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 454]

Cross examination.

By Mr. Williams:

Q. That under this provision in paragraph 5 of the plan, setting forth these racial conditions based on a minority race transfer, the effect of it is to permit a child to choose segregation outside of his zone but not to choose integration outside of his zone? That is true, isn't it?

A. The child and his parents can choose, yes.

The Court: Is this identical to the City's provision?

The Witness: I think so.

Mr. Dodson: Verbatim.

Mr. Williams: It is substantially identical to the City provision, if Your Honor please, but it was not brought to this Court's attention at the time that the City provision was approved, exactly how the City provision operates, as Mr. Moss has described. It has been operated so that instead of going to the school in his zone and there seeking [fol. 455] a transfer, no White child in the City has ever

seen one of the allegedly integrated schools to which he was assigned, no Negro child who didn't affirmatively seek a transfer to an integrated school has ever seen the integrated school to which the Nashville Board led this Court to believe he was assigned. So that this presents a little different, a little more than was before the Court in that case.

The Court: All right, go ahead.

By Mr. Williams:

Q. And that is true, what I have stated, isn't it, Mr. Moss? That's the way the plan operates in the City and that's the way you intend to operate it?

A. That is correct.

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[fol. 456] Dr. Eugene Weinstein, a witness called on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Williams:

Q. This is Dr. Eugene Weinstein?

A. Yes.

Q. Dr. Weinstein, that speaker doesn't operate as a loud-

[fol. 457] speaker. Speak loud enough so that everybody can hear you.

A. They will.

Q. Dr. Weinstein, you live here in Nashville, do you not?

A. Yes, sir.

Q. How long have you been in this locality, sir?

A. A little over two years.

Q. Where are you employed, sir?

A. Vanderbilt University.

Q. In what capacity?

A. I am Associate Professor of Sociology.

Q. Dr. Weinstein, where did you receive your education?

A. I got my bachelor's degree from the University of Chicago, my master's degree from Indiana University, and my Ph.D. from Northwestern University in 1954.

Q. And was your Ph.D. in the field of—

A. In the field of sociology, specializing in social psychology.

Q. Now, Dr. Weinstein, after your acquisition of a doctorate, did you do any further postgraduate study or research?

A. Research. I spent the years prior to coming to Vanderbilt in research and doing research in the general area of child development. I spent the immediate period of three years as a research analyst for the Children's Bureau of the Department of Health, Education, and Welfare.

Q. In Chicago?

A. No, in Washington.

Q. In Washington, D.C.?

A That's right.

Q. Then I take it that you would consider yourself reasonably an expert on the subject of child development?

A. Reasonably well versed, yes.

Q. Dr. Weinstein, have you done any recent study or a recent study on the subject of desegregation in Nashville?

A. Yes, I have.

[fol. 458] Q. Has there been any other study of the same type that you have done, made by any social scientists, as far as you know?

A. As far as I know, no. This is the first study of its kind.

Q. Will you explain, sir, just what this study was, what it consisted of, and what your findings were?

A. That would take a great deal of time, as far as defining it is concerned.

Q. Well, if you will explain what it was and what it consisted of, I think I can focus the particular findings that we would like to bring out.

A. This was a study of the general area of Negro attitudes and decision-making regarding desegregation. Roughly, the outlines of the study are this: given the grade-a-year plan and system of eligibility under the Nashville plan, two groups of Negro parents are created, a group which has chosen to exercise their option and attend a desegregated school, a formerly all-White school, and a group which has the same option but has chosen to send

their children to segregated schools, to the historically Negro schools.

The study was concerned with— Well, actually, there is a third group of parents who send their children to desegregated schools and then, subsequently, for one reason or another, withdraw them.

The study was concerned with identifying the factors which were related to the choice. It was concerned with the decision to segregate or to desegregate made by the involved Negro families. Some 88 families, mothers for the most part, were intensively interviewed in the course of the study.

Q. And were these findings, then, systematically accumulated, analyzed, and conclusions reached on the basis of that?

A. Yes.

[fol. 459] Q. Now, Dr. Weinstein, based on—I should ask you when this study was made. I don't believe you stated that.

A. The bulk of the interviewing was done this past summer between the months, roughly, of about May and September. I might also add that the interviewing was done not by myself but by a trained Negro interviewer.

Q. Why did you use a Negro interviewer, Dr. Weinstein?

A. This is common practice in research of this kind, to use interviewers who are most likely to be able to establish rapport, get easy, frank responses from respondents. It has been discovered, in this area especially, that Negro interviewers are more effective in interviewing Negroes.

Q. Now, Dr. Weinstein, getting down to some of the findings of your study, with particular reference to the group of families who did not send their children to integrated schools, will you state what your findings were with regard to the attitudes and the reasons of the parents for that?

A. The single most frequent reason given, given in roughly 40 per cent of the cases, was the difficulty or inadvisability or lack of willingness on the parents' part to separate children. Under the grade-a-year plan they would have—they had older children who were not eligible to attend the desegregated school. In order to take advantage

of the eligibility of the younger child, they would have to split their families, split their children and send them to two different schools. This was in 19. This was mentioned as the primary reason of 19 of the 50, or roughly 40 per cent of the cases. It was a factor involved in roughly 60 per cent of the cases. Twenty-nine out of the 50 would have to split children.

Q. And this was, then, according to your findings, the [fol. 460] major reason?

A. This was the most frequent single factor, yes.

Q. Now, with specific reference to fear of friction or of violence or anything of that nature, what were your findings with regard to that?

A. For the whole sample, over 90 per cent, for the whole sample, expected no difficulties. The only difficulties that were reported in the desegregated group were occurrences which had experiences which they had had in the initial weeks of desegregation back in 1957. In eight cases they did mention the telephone calls, the cars parading back and forth in front of their homes on the street, strange cars. Only four of the 50 desegregated—rather, segregated families indicated that they expected or could think of any groups or persons who might be out to make trouble for them.

Q. You mean only four out of 50?

A. Only four out of the 50 indicated—

Q. Of those who actually didn't send their children?

A. Actually didn't, that's right.

Fear, I would say, fear of violence or difficulty or of economic threat (we also asked them about losing their job) was a minor factor in the decision-making process.

Q. I would ask you what were the findings with regard to the feeling that the children would or would not do better in integrated schools with regard to the parents who sent their children to integrated schools?

A. Of the 27 families who we interviewed, sent their children to integrated schools, were asked the following questions. One of the questions they were asked was: Do you think your child would learn more quickly, less quickly, or about the same in the integrated school? Fourteen of the 27

[fol. 461] thought that the child would learn more quickly. The rest either did not know or felt it would make no difference. There were no cases in which it was felt the child would learn more slowly.

Q. So that the overwhelming majority of these parents either felt that the child would do better in school or did not know?

A. Or thought that it would make no difference.

Q. Or thought that it would make no difference.

A. But the most frequent response was that.

Q. The most frequent response was, approximately half of them said that they felt they would do better?

A. They felt that their children are doing better.

Q. Are doing better?

A. Are doing better, yes. They have had the experience.

Q. Dr. Weinstein, are there any other findings that you think are material on this, of your study that you think are material on the question of the advisability of this plan, before we get into the conclusions?

A. There are one or two that have, I think, an incidental bearing, at least. One is the source of information regarding their eligibility that was reported by the parents.

Q. Yes, sir.

A. Newspapers and TV were reported in somewhat over half of the 88 cases. The single most frequent source of information, interestingly, was a visit by members of some civic organization, interested in encouraging parents to take advantage of their eligibility, informing the parent of their eligibility.

There were surveys, door-to-door surveys during 1958, then again last summer, in which for the first time—in roughly 40 per cent of the cases, this was the initial main source of information, people coming around, members of these organizations, a part of this program, coming around [fol. 462] telling these children, or the parents, rather, that they have an eligible child. This, I think has some bearing on the current situation.

Q. So that your report would tend to indicate that the parents in the City of Nashville, the majority of them were not notified by the Board of Education as to where their children should report?

A. We had 13 out of the 88 cases reported that they found out about their eligibility from the school.

Q. Thirteen out of eighty-eight?

A. This was upon making inquiry at the school.

Q. Now, let me ask you if this second point you have in mind, is there anything in your study to indicate whether parents who sent their children to integrated schools felt that they were emotionally upset, or isolated?

A. In 24 out of 27 cases, the response was, No. In one the parent couldn't tell. There were two instances in which the parent said that there were difficulties at first. Two out of the 27 cases reported some adjustment difficulties in the beginning.

Q. Now, Dr. Weinstein, was there anything else? Was I correct in assuming that that was the second point that you felt was relevant to this plan?

A. Yes; yes.

Q. Based on the findings of this survey or research, what would be some conclusions, in your opinion as an expert, that might validly be reached with regard to the grade-a-year plan which has been proposed by the Davidson County Board of Education and which I have allowed you to read?

A. Well, we must distinguish between data and conclusion, data and inference. However, in experience of these parents, one inference we might draw, I think reasonably, plausibly, is that the grade-a-year plan does impose a [fol. 463] hardship or does impose a factor on a number of Negro families, makes it difficult for them, in a sense discourages them to take advantage of their eligibility. This is the factor of having to split children, separate children, send them to different schools, which is purely a product of the grade-a-year system.

Q. I might ask you something in regard to this. Is there something involved in this factor other than mere inconvenience? Is there also a factor of fear for safety and that sort of thing?

A. Not so much fear for safety, but parents did express the fact that they would like to be able, or expressed the opinion that they would like to be able to send their children together to the new situation. They would feel more comfortable if both children could go into this new kind of

situation, which actually is psychologically a sound approach on the part of these parents.

Q. Yes. Now, I would like to ask you this: If the purpose of a desegregation plan is to achieve a racially nondiscriminatory school system in which race is not a factor, what, in your opinion, would be the effect of the transfer provision in this plan, based on—predicated on racial factors, in the light of achieving that end?

A. Here we move, not only with the implications of this study, so that it makes it easy for Negro families who don't want to, to discourage them actually. The transfer system in combination with the grade-a-year plan has an important effect on this family separation issue.

The Nashville experience (I have some familiarity with the Nashville experience, studying it rather carefully, what information was available in preparation for the current research) would indicate mass transfers, mass paper [fol. 464] transfers of Whites back into what is historically the White school, of Negroes remaining in what is historically the Negro school. I would say that the transfer provisions tend—in my opinion, tend to keep the system oriented toward a segregated system with token desegregation. This would be the major thrust, the major orientation system.

Q. Then I believe you would agree with Dr. Long's testimony yesterday that the transfer provision in this plan is weighted and also the grade-a-year aspects of it are weighted towards officially maintaining segregation in the school system?

A. Yes. For many of the same reasons that Dr. Long indicated and for reasons indicated by the current research.

Q. Now, with regard to this question of emotional adjustment and disciplinary problems among older children, are you familiar with any scientific studies which have been made which are relevant to the effects of change from segregation to integration on young adult behavior?

A. I could indicate two in particular. One is a doctoral dissertation currently being written under my supervision on the Oak Ridge High School desegregation situation, comparing the attitudes of the White children in the desegregated high schools subsequent to desegregation with the attitudes of their parents.

Q. I believe the high school in Oak Ridge, Tennessee, has been integrated since very shortly after the Supreme Court decision, has it not?

A. Yes. These data—Students will sometimes take a while in getting their dissertation written, so the data were actually drawn shortly after the Oak Ridge high school was desegregated.

The major finding of this study is that the attitudes of the children, the high school students in the desegregated [fol. 465] situation, the White students, are significantly more favorable to desegregation than those of their parents on, not only their general attitudes, but there was listed point by point such things as eating in the cafeterias, attending dances together, joint use of the swimming pool, and that. And, oh, some 20-odd specific areas of desegregation relevant to the high school situation. This is one piece of research.

There is another, a very large scale research conducted during World War II, reported in the monumental work, The American Soldier, attempting to assess the influence of desegregation under combat conditions, the influence of desegregation, of experimental integration of Negro platoons into White companies on White attitudes, on prejudice, or attitudes toward the Negro; and it was found that White companies who had integration experience—And these were matched on all kinds of significant variables. The general tenor of the findings was that the greater the degree of contact with Negro troops—the greater the degree of integration in the company, rather, the more favorable were the attitudes of the Whites toward integration in that company.

From this study, from general studies of the relationship of contact to attitudes and prejudice, the general conclusion has been drawn that contact under conditions of equality, so that a master-servant relationship will not affect—This is contact, but it doesn't affect attitude. But contact under conditions of equality and a common task tends to have the effect of reducing intergroup prejudice.

Q. Dr. Weinstein, I believe you said you had done considerable research on child development?

A. Yes. I published numerous papers, two books.

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[fol. 466]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT —November 23, 1960

This cause came on to be heard before the Honorable William E. Miller, District Judge, on October 27, 1960, and prior days of the term, upon the entire record, oral testimony and exhibits without the intervention of a jury, brief and arguments of counsel, from all of which the Court finds and holds as follows:

FINDINGS OF FACT

1. The plaintiffs, all of whom are Negro school children and their parents and are citizens and residents of Davidson County, Tennessee, filed this action on 19 September, 1960, seeking declaratory and injunctive relief against enforcement of the custom, practice and policy of the defendant, County Board of Education of Davidson County and its Superintendent of Schools, J. E. Moss, requiring racial segregation in the County Schools and refusing to admit certain of the plaintiffs to certain schools solely because of their race or color. Plaintiffs also prayed for an order requiring defendants to submit a plan for reorganization of the entire County School System into a unitary nonracial school system, including plans for elimination of racial segregation in teacher and other personnel assignments, school construction, and the elimination of any other discrimination in the operation of the school system or in the school curriculum which are based solely upon race or color.

2. The defendants, Frank White; S. L. Wright, Jr.; F. K. Hardison, Jr.; Ferriss C. Bailey; E. D. Chappell; Aubrey Maxwell; and Olin White, together comprise all the duly elected members of the defendant County Board of Education of Davidson County, Tennessee, and are sued [fol. 467] in their individual and official capacities together with said Board of Education, which is sued as a continuous body or entity. Defendant, J. E. Moss, is the duly elected

or appointed County School Superintendent and/or Superintendent of Public Instruction of Davidson County, and is sued in both his individual and official capacity. The Board of Education is vested with the administration, management, government, supervision, control and conduct of the public schools of said County, and defendant, J. E. Moss, as administrative agent for the Board, has immediate control of the operation of the County Schools, and serves as a member of the Executive Committee of the Board.

3. The defendants, acting under color of the laws of the State of Tennessee and County of Davidson, have pursued for many years and are presently pursuing a policy, custom, practice and usage of operating a compulsory racially segregated school system in and for said County. The racially segregated school system operated by defendants consists of a system of elementary, junior high, and high schools, limited to attendance by white children and negro children, respectively, of the County of Davidson. Attendance at the various schools is determined solely upon race and color. A dual set of school zone lines is also maintained. These lines are based solely upon race and color. One set of lines relates to the attendance areas for the Negro schools and one set to the attendance areas for the white schools. These lines overlap where Negro and white school children reside in the same residential area.

4. At the beginning of the September 1960, school term, the infant plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, made application individually and/or [fol. 468] through their parents to defendants for admission or transfer to Glencliff Junior High School and/or Antioch High School, same being "white" schools which are nearer to their residence than Haynes High School, the "Negro" school they are required to attend, and were refused said admission or transfer solely on account of their race or color. At the same time, the infant plaintiffs, Cleophus Driver, Christopher C. Driver, Deborah Driver, and Deborah Ruth Clark, made application individually and/or through their parents for admission or transfer to Bordeaux Elementary School, a "white" school which is nearer to their residence than Haynes School, the "Negro"

school they are required to attend, and were refused admission or transfer by defendants, solely on account of their race or color. Had these infant plaintiffs been white children, they would have been admitted or transferred to the said "white" schools to which they applied.

5. The infant plaintiffs, Jacqueline Davis, Shirley Davis, George Davis, Jr., Robert Davis, Rita Davis, and Robert Rickey Taylor, reside nearer to a Negro school which they have been attending, but some of them accompanied the other plaintiffs when they made application for admission to said "white" schools, and all of them join in this action because they allege that they are being denied their right to enjoy a nondiscriminatory public education by reason of the compulsory racially segregated public school system which defendants are maintaining and operating in and for Davidson County.

6. At a preliminary hearing on 26 September, 1960, this Court reserved judgment on motions by defendants to strike and/or dismiss those portions of the complaint com- [fol. 469] plaining of segregated teacher and personnel assignment, but ordered the defendants to submit a complete and substantial plan which will accomplish complete desegregation of the public school system of Davidson County, Tennessee in compliance with the requirement of the Fourteenth Amendment to the Constitution of the United States.

7. Pursuant to said order of the Court, the defendants subsequently filed with the Court the following plan for desegregation of the school system:

PLAN

1. Compulsory segregation based on race is abolished in Grade One of the Davidson County Schools for the scholastic year beginning in September 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Two in September 1962, Grade Three in September 1963, Grade Four in September 1964, etc.

2. A plan of school zoning based upon location of school buildings, transportation facilities and the most re-

cent scholastic census, without reference to race, will be established for the administration of the first grade, and other grades as they are desegregated according to the gradual plan.

3. Students entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may become necessary in particular cases.

4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, [fol. 470] from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration.

5. The following will be regarded as some of the valid conditions for requesting transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only.

   b. When a colored student would otherwise be required to attend a school previously serving white students only.

   c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race.

6. A plan of pupil registration to be held each Spring to aid in formulating necessary arrangements for the opening of schools in the Fall, such as available room, teaching aids, textbooks, pupil immunizations, zoning, and transportati facilities, will be continued.*

* This has been done for years.

7. Transportation will be provided to all students that are eligible for bus service.*

8. Thereafter, the plaintiffs filed the following specifications of objections to said plan:

[fol. 471]

SPECIFICATION OF OBJECTIONS TO PLAN FILED BY COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY

The plaintiffs, Henry C. Maxwell, Jr., *et al.*, respectfully object to the plan filed in the above entitled cause on or about the 19th day of October, 1960, by the defendant, County Board of Education of Davidson County, Tennessee, and specify as grounds of objection the following:

1. That the plan does not provide for elimination of racial segregation in the public schools of Davidson County "with all deliberate speed" as required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. That the plan does not take into account the period of over six (6) years which have elapsed during which the defendant, County Board of Education of Davidson County, has completely failed, neglected and refused to comply with the said requirements of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. That the additional twelve (12) year period provided in said plan is not shown to be "necessary in the public interest" and "consistent with good faith *compliance* at the earliest practicable date" in accordance with the said requirement of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

[fol. 472] 4. That the defendants have not carried their burden of showing any substantial problems related to public school administration arising from:

* This has been done for years.

a. "the physical condition of the school plant";

b. "the school transportation system";

c. "personnel";

d. "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis";

e. "revision of local laws and regulations which may be necessary in solving the foregoing problems";

as specified by the Supreme Court in *Brown* v. *Board of Education* (May 31, 1955) 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 653, which necessitate the additional time contemplated by their plan for compliance with the constitutional requirement of a racially unsegregated public educational system.

5. That the plan is manifestly a substantially exact copy of the "Nashville Plan" adopted by defendants without reference to the local conditions in Davidson County as a minimum plan predicated on subjective and mental fears of the defendants as to possible community hostility or friction among students, and is not supported by a showing of any objective administrative conditions or problems which legally justify its complete deprivation of the constitutional rights of plaintiffs and all other children now in school to an integrated education by projecting the bar of segregation into the next twelve years.

[fol. 473] 6. That the plan forever deprives the infant plaintiffs and all other Negro children now enrolled in the public schools of Davidson County, of their rights to a racially unsegregated public education, and for this reason violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the plan wholly ignores and fails to comply with the statement of this Court from the Bench on 26 September, 1960, holding that the individual plain-

tiffs "have been denied their constitutional and legal rights", and suggesting that they be accorded these rights by defendants voluntarily rather than by court order, in that under the plan the individual plaintiffs can never be admitted to an integrated school and are forever deprived of their rights to a racially integrated public education in Davidson County.

8. That the plan fails to take into account recent annexation by the City of Nashville of a large area of surrounding Davidson County resulting in the public schools of said County becoming part of the City of Nashville School System, which latter School System is now desegregated from the first through the fourth grades.

9. That the plan fails to take into account the rights of the infant plaintiffs and other Negro children similarly situated and forever deprives them of their rights to enroll in and attend any technical or other special or vocational schools, summer courses and educational training of a specialized nature as to which enrollment is not based on location of residence.

[fol. 474] 10. Pragraph five (5) of the plan violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operate to perpetuate racial segregation.

11. That the plan contemplates continued maintenance and operation by defendants of "Negro" and "white" schools substantially designated by race, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, in that it fails to make any provision for the reorganization of the entire County School System into a unitary, nonracial school system so as to include a plan for the assignment of teachers, principals and other school personnel, as well as school

children, on a nonracial basis; for the allotment of funds, construction of schools and approval of budgets on a nonracial basis; and for the elimination of all other discriminations in the operation of the school system or in the school curriculum which are based solely on race and color.

Whereof, the plaintiffs pray:

1. That the Court grant their motions for temporary restraining order and preliminary injunction so as to require the immediate admission by defendants of the individual plaintiffs to the public schools of Davidson County, Tennessee on an unsegregated basis.

[fol. 475] 2. That the declaratory and permanent injunctive relief prayed for in their complaint be granted, said injunctive relief to be effective not later than the beginning of the Spring Semester or Term of the public schools of Davidson County in January 1961.

3. That the defendants be required by the Court to reorganize the entire County School System of Davidson County, Tennessee into a unitary nonracial school system, including all of the matters prayed for in the sixth prayer of the complaint filed in this cause.

9. At the hearing on said plan on 24 October 1960, the defendants offered, in support of the plan, the testimony of Mr. Ferriss C. Bailey, Chairman of the Special Committee of the Board charged with preparing the plan, who had been a member of the Board for several years and previously had been a member of the City of Nashville Board of Education, and who testified that the plan was prepared by the Staff, and that the Board accepted and approved the plan and that he thought it a wise plan. Mr. J. E. Moss, the County Superintendent for many years, testified as an expert that he believed the plan to be a wise and workable one; Mr. W. H. Oliver, Superintendent of Schools of the City of Nashville, testified as an expert that the Nashville grade a year "stair-step" plan initiated under Court order in 1957 had proved a wise and workable one for Nashville. In addition, the Attendance Officer, Psy-

chologist and Transportation Officer of the County Schools, testified as to data relating to school population, pupil achievement levels and school bus transportation respectively, in the County School System. Defendants also introduced a zoning map and attendance schedule showing [fol. 476] the projected maximum expected distribution of Negro school children in presently white County Schools under nonracial zoning. All of said staff members had several years experience in their respective positions in Davidson County, and were intimately acquainted with conditions in that county and all problems involved in desegregation therein.

10. In opposition to the plan, plaintiffs introduced the testimony of Dr. Herman Long, Director of the Department of Race Relations, American Missionary Association of the Congregational Church, and teacher of Sociology in Fisk University, Nashville, Tennessee, for several years, an expert in the field of race relations in the United States; Dr. Eugene Weinstein, Assistant Professor of Sociology in Vanderbilt University, Nashville, Tennessee, an expert in the field of child development, who has conducted a recent research study of attitudes of Negro parents involved in public school desegregation in the City of Nashville, located within Davidson County, Tennessee; Dr. J. Masuouka, Professor of Sociology and Chairman of the Department of Social Science at Fisk University, Nashville, Tennessee for several years, an expert in the field of race relations among peoples of the world; and the plaintiffs, Henry C. Maxwell, Sr., Mrs. Annie P. Driver, and Mrs. Floy Clark (the latter by stipulation). The plaintiffs testified that they objected to the plan because it would prevent their children now in school from enjoying their constitutional rights to a nonracially discriminatory public education, that their children wanted to enjoy such an education now, and that they feel their children are being injured by the racially segregated education they are now [fol. 477] receiving. The plaintiffs' aforesaid expert witnesses were of the opinion that desegregation could reasonably be effected in the Davidson County School System within one year; and that the pupil transfer provision

contained in the proposed plan, as drafted, would necessarily tend to perpetuate segregation. However, these witnesses, although expert witnesses and outstanding men in their respective fields, have had no actual experience with or responsibility for the administration of the schools in Davidson County and lack the same intimate knowledge of local conditions possessed by defendants' witnesses.

11. This Court approved in the case of the City of Nashville a plan of gradual desegregation after considering the particular facts which prevailed in that case. This plan of gradual desegregation, according to the testimony in this case, has worked well in the City of Nashville and has proved to be a workable and a feasible plan of desegregation. It has proved to be, in the opinion of the Superintendent of City Schools, a very wise plan for this community.

12. As stated, the school authorities of Davidson County, including the members of the staff, are close to the situation in Davidson County, are more intimately acquainted with them and have more knowledge about them than anyone else could possibly possess and the primary responsibility rests with these authorities, whose perogatives and rights should not be usurped by the Courts.

13. From the testimony in this case it is evident that:

a. A plan of gradual desegregation works with a minimum of difficulties in this community.

[fol. 478] b. Practically all of the schools of Davidson County are or may be affected by a plan of desegregation for the reason that the areas populated by Negroes are greatly scattered throughout the County.

c. There has been a tremendous increase in the school population in Davidson County over the past several years, with the result that practically all of the school housing facilities are crowded or overcrowded and the teacher-pupil load is at a peak in the system.

d. The County school system operates a transportation system, which system is presently operated at peak capacity, and the bus drivers are solely charged

with maintaining discipline on the bus, in addition to their other duties, so that any factor which increases or tends to increase disciplinary problems on the buses likewise increases the hazards to the safety of the pupils. Discipline among the pupils on the buses is increased with a mixing of the races, especially when such is commenced at grade levels above the first and/or first and second grades.

e. Because the children of the two races have not been intimately associated due to proximity of residences in the County, a great emotional impact will be experienced by the children of both races following desegregation of the schools.

f. Negro children in the higher grade levels who have not previously attended desegregated schools have an achievement level substantially below that of white children, and such disproportion in achievement level [fol. 479] increases in direct proportion to the grade of the child so that any complete desegregation, except upon a graduated basis, would create additional difficulties for the children of both races.

g. Any change of organization or plan in the school system, other than at the end of a school year or a school semester, would cause confusion and disruption of classes with an accompanying loss of teacher time and student time.

14. The school in the Bordeaux community, one of the schools where the plaintiffs have made application for enrollment, has been partially destroyed by fire, and the school population there is presently being cared for on a makeshift basis, with all existing facilities overtaxed. The Antioch School, one of the schools where plaintiffs made application for enrollment, is the most overcrowded school in the entire system, and the time consumed in traveling to the Antioch School by bus from the residence of these plaintiffs is as great as the time consumed by such plaintiffs in traveling by bus to the Haynes High School, to which they are presently assigned.

15. It is particularly desirable to have the school system of the City of Nashville and that of Davidson County operating on a parallel basis.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of this action, which is filed pursuant to Title 28, United States Code, Sections 1331, 1343, 2001 and 2202, and Title 42, United States Code, Section 1983, for injunctive and de- [fol. 480] claratory relief to redress rights of the plaintiffs secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and by the Act of May 13, 1870, Chapter 14, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981).

2. This is a class action brought not only by the plaintiffs for their own benefit but also on behalf of all other persons similarly situated.

3. The Court at the outset considers the case with the established principle that compulsory racial segregation is unconstitutional and that the plaintiffs and those they represent are entitled to have their rights declared and enforced accordingly.

4. In approving a plan of gradual desegration in the case of the City of Nashville, after considering the particular facts which prevailed in that case, the Court made the statement in substance that each case must be determined on its own facts and that a decision elsewhere in the United States may or may not be relevant depending upon the conditions, whether or not they were comparable to the situation which prevailed here, and that, after all, this was a problem which must be determined locally and in accordance with local conditions. That case was appealed to the Court of Appeals of this Circuit, and was affirmed in a unanimous decision of that court. Thereafter at a later date the Supreme Court of the United States refused to review it by denying certiorari, which left, insofar as this Court is concerned, the decision of the Court of Appeals in full force and effect as stating correct legal principles.

[fol. 481] 5. This Court does not hold that automatically the Nashville Plan constitutes the plan which should be applied to Davidson County. The pertinent factors must be weighed and assessed, and if the factors are substantially similar, then the precedent of that case should guide the Court in the decision of this case. If they are materially dissimilar, then that case would not apply. Considerable flexibility is involved in applying the controlling legal principle.

6. The Court must decide the case in accordance with what it thinks is a realistic plan for the community itself, considering all of the conditions and circumstances involved, the administrative problems, the personnel problems, and any other relevant and pertinent factors, one of the important ones of which is the efficient and harmonious operation of the school system itself. The Court must not disrupt and destroy the school system. That fact must be kept in mind always.

7. The Supreme Court has recognized the principle that the primary responsibility in assessing and weighing these factors rests with the constituted school board and authorities.

8. The Court does not have any doubt that the School Board has acted in good faith, and has fully carried the burden of proof to show the feasibility of the principal features of the proposed plan.

9. The plan presented by the defendant County Board of Education should be approved by the Court with the following exceptions and modifications:

[fol. 482] a. Instead of the first grade being desegregated, as contemplated by said plan, the Court is of the opinion and holds that the first four grades should be desegregated at one time. This will equalize the plan with the City of Nashville Plan. It is particularly desirable to have the grades of the two systems operation on a parallel basis.

b. In view of the delay which has already occurred in regard to desegregation, the plan should be effec-

tive and should be put into operation (that is, the first four grades should be desegregated) at the beginning of the next school semester beginning January 1961, rather than the next school year; and the first five grades will be desegregated beginning September 1961.

c. A specific provision should be included in the decree for the complete elimination of any possible discrimination with respect to the summer classes which are attended by outstanding students. In other words, facilities on a nondiscriminatory, desegregated basis will be provided for students of this type, and provision will be made to notify all teachers in the system, both colored and white, of the availability of these classes, so that there will be no doubt about the colored students having knowledge of the opportunities made available in this respect.

d. Specific notice will be given to all parents of the zone in which their children live. In other words, before the beginning of the school year, the parents of all children will receive specific notice of the zone in which their children fall for the purpose of attending classes [fol. 483] in order that there may be removed any possible doubt about some people not having full information.

e. The Court will retain jurisdiction of this case throughout the period of transition.

10. The legal rights of all plaintiffs are recognized and declared but they are enforced in accordance with the provisions of the plan with the above modifications. Said plan is not a denial of the rights of the individual plaintiffs, but is a postponement in enforcement of the rights of some of the plaintiffs in the interest of the school system itself and the efficient, harmonious, and workable transition to a desegregated method of operation.

11. Judgment should again be reserved, for the present, on defendants' motions to strike and to dismiss certain portions of the complaint relating to segregated teacher and personnel assignment, and on the matters raised in

the complaint which are involved in said motions, pending submission of further memoranda and argument of counsel.

12. The prayer of the plaintiffs for injunctive relief should be denied, except for the matters as to which judgment is reserved.

JUDGMENT

It is accordingly ordered, adjudged and decreed as follows:

1. That the plan submitted by the County Board of Education of Davidson County, Tennessee, is approved, except in the following particulars:

[fol. 484] a. Compulsory segregation based on race is abolished in Grades One through Four of the Davidson County Schools for the Second Semester of the 1960-61 school year beginning January 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Five in September 1961, Grade Six in September 1962, etc.

b. As respects the summer classes attended by outstanding students, there will be no segregation based on races, and notice of such will be immediately given by the School Board to all teachers in the Davidson County school system, both Negro and white, of the availability of these classes.

c. The Davidson County School Board will, prior to the beginning of the Second Semester of the 1960-1961 school year, and prior to the beginning of each school year thereafter, give specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes.

2. The prayer of the plaintiffs for injunctive relief be, and the same is hereby denied, except with regard to those matters as to which judgment is hereinafter reserved.

3. Jurisdiction of this case is retained by the Court throughout the period of transition.

4. Judgment is reserved on the question of the motion to strike and those portions of the motion to dismiss not [fol. 485] hereinbefore overruled, and on the matters raised in the complaint which are involved in said motions.

To the foregoing action of the Court in approving the plan submitted by defendants and in denying plaintiffs' prayer for injunctive relief, the plaintiffs except.

This the 23rd day of November 1960.

Wm. E. Miller, United States District Judge.

[fol. 486] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ORDER, NOVEMBER 29, 1960

In this action the Court heretofore entered its Findings of Fact, Conclusions of Law and Judgment approving with certain modifications a plan for the gradual desegregation of the public schools of Davidson County, and for admission of school children to the schools of the county system without discrimination on account of race. At that time, however, the Court expressly reserved judgment on the defendants' motions to strike and dismiss certain portions of the complaint relative to segregated teacher and personnel assignment, and on the matters raised in the complaint involved in said motions, including the question of injunctive relief, pending submission of further briefs and argument of counsel. Such briefs have now been submitted and the Court has given full consideration to the questions as to which judgment was reserved.

Upon full consideration of the briefs, applicable authorities, and the entire record, the Court is of the opinion that the allegations of the complaint challenged by the motions to strike and to dismiss raise issues of such character as to require an investigation upon the merits, and that such allegations should not be summarily stricken or dismissed without a hearing. Motions to strike allegations in plead-

ings are not favored and in case of doubt should not be sustained.

It is, therefore, ordered that the motions to strike and to dismiss those portions of the complaint relating to teacher and personnel assignment be and they are hereby overruled, and that the defendants be and they are hereby allowed twenty days from date in which to further plead to the complaint.

[fol. 487] The Court reserves judgment as to the substantive questions involved, including the question of granting injunctive relief, pending a further hearing after the issues have been fully joined between the parties.

Wm. E. Miller, United States District Judge.

[fol. 488]

IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFFS FOR FURTHER RELIEF—
Filed December 12, 1960

The plaintiffs in the above entitled case, respectfully move the Court for immediate further relief upon the grounds and in the particulars as hereinafter stated:

1. That the defendants have not given "specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes", as required by the order of this Court, filed 23 November 1960; but, on the contrary, defendants have merely furnished a form letter with an attached paper designated "Transfer Request" to some school children through their teachers in some of the schools, with no assurance that said letters or the attached paper will reach the parents of said school children.

Two of said letters, addressed to the plaintiff, Mrs. Annie P. Driver and her spouse, together with the attached "Transfer Requests", are appended hereto and marked as Collective Exhibits "A" to this motion.

2. That the aforesaid form letters and attached "Transfer Requests", are misleading and are manifestly designed

to mislead parents and to evade said order of this Court approving a plan for general desegregation, in that:

(a) Nowhere in said letter or "Transfer Request" is it stated that parents are given notice "of the zone in which their children fall for the purpose of attending classes", as provided in said order of the Court.

(b) The aforesaid letter states that a child may be "transferred January 20, 1961 to the newly zoned school", whereas under the modified plan approved by the Court and the order of the Court providing for general desegregation of the first four grades on said date, it is not necessary for children in these grades to be "transferred" to the school in which they "fall for the purpose of attending classes"; but, [fol. 489] on the contrary, any application for transfer would and should be made "from the school of their zone to another school".

(c) The aforesaid design and effect of misleading parents and encouraging continued maintenance of racial segregation is further shown by the said "Transfer Request" form, which purports on its face not to be an application for transfer to a school other than the school in which the children "fall for the purpose of attending classes" as ordered by this Court, but rather purports to be a request to be "TRANSFERRED" to the school for which the child is zoned. Said misleading and evasive design and effect is emphasized on said "Transfer Request" form by capitalization and underlining of the word "transferred", as indicated above, and by placing first on said form as an alleged "choice", the following: "I request permission for this child to stay at ....." /
(name of school)

3. Said letters of alleged notification are further misleading and evasive in that they tend to indicate to parents of school children that they have no right to attend school on a racially desegregated basis as provided in the plan approved by this Court; but that, on the contrary, application for transfer to the newly zoned school must be made on the attached "Transfer Request", which "transfer" might or might not be granted by the Board in its discretion.

4. The requirement that said "Transfer Request" be returned to defendants "within *three days*", as contained in the aforesaid letters, is both ambiguous and unreasonable, and is designed to encourage and foster hasty action on the part of parents whom said form letters and "Transfer Requests" reach.

[fol. 490] WHEREFORE, plaintiffs respectfully move the Court that they be granted immediate and further relief as follows:

(1) That the aforesaid letters and "Transfer Requests" sent out by the defendant Board of Education and Superintendent of Schools to school children through school teachers employed by defendants, be declared by the Court to be void and of no effect because same are not in compliance with the aforesaid order of the Court, filed 23 November 1960 or the plan thereby approved by the Court.

(2) That the defendants be required by the Court to prepare new notices which shall notify all parents directly of the desegregation plan which has been approved by the Court, and of the school in which their children fall for the purpose of attending classes; and that if any form is enclosed therewith relating to application for transfer, that the application specifically indicate that same is for transfer from the school zone in which the children fall for the purpose of attending classes, to some other school.

(3) That before any such new form of notification or for transfer application be sent out to the parents as aforesaid, copy of same be furnished to counsel for plaintiffs and approved by the Court after hearing if same be found objectionable to the plaintiffs.

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Av., Nashville 3, Tenn., Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, Suite 1790, New York 19, N. Y., Attorneys for Plaintiffs.

[fol. 491]

IN UNITED STATES DISTRICT COURT

EXHIBIT "A" TO PLAINTIFFS' MOTION

(Letterhead of County Board of Education,
Davidson County)

December 5, 1960

Mr. & Mrs. Cleophas Driver
1626 Emerald Dr.
Nashville, Tennessee

Re: Christopher C.
Name

Grade: 1 2 3 (4)

Dear Parents:

The Davidson County Board of Education has been given a court order to fix zones for all schools regardless of race. You will note that the attached Transfer Request will indicate the school the child is now attending and the school to which the child is zoned.

Please mark Transfer Request for either, (1) Permission to remain in the school he is now attending or, (2) Be transferred January 20, 1961 to the newly zoned school.

After you have signed the Transfer Request and marked an X by your choice, return it to your child's teacher within *three days.*

Consideration will be given to your choice indicated on the Transfer Request.

Sincerely yours,

/s/ J. E. Moss
J. E. Moss
Superintendent

JEM:mb

[fol. 492]

TRANSFER REQUEST (GRADES 1-4)

Christopher C. Driver Date: Dec. 5, 1960 Grade: 4
NAME OF STUDENT

1626 Emerald Dr.
ADDRESS

School now attending: Haynes

School zone in which you live: Bordeaux

PLEASE CHECK *ONE*

☐ I request permission for this child to stay at Haynes
(name of school)

☐ I request permission for this child to be TRANSFERRED on January 20, 1961 to Bordeaux
(name of school)

.....
SIGNATURE OF PARENTS

REMARKS: .....

.....

[fol. 493]

(Letterhead of County Board of Education,
Davidson County)

December 5, 1960

Mr. & Mrs. Cleophas Driver
1626 Emerald Dr.
Nashville, Tennessee

Re: Deborah Darnell
Name

Grade: 1 (2) 3 4

Dear Parents:

The Davidson County Board of Education has been given a court order to fix zones for all schools regardless of race. You will note that the attached Transfer Request will indicate the school the child is now attending and the school to which the child is zoned.

Please mark Transfer Request for either, (1) Permission to remain in the school he is now attending or, (2) Be transferred January 20, 1961 to the newly zoned school.

After you have signed the Transfer Request and marked an *X* by your choice, return it to your child's teacher within *three days.*

Consideration will be given to your choice indicated on the Transfer Request.

Sincerely yours,

/s/ J. E. Moss
J. E. Moss
Superintendent

JEM :mb

[fol. 494]

TRANSFER REQUEST (GRADES 1-4)

Deborah Darnell Driver Date: Dec. 5, 1960 Grade: 2
NAME OF STUDENT

1626 Emerald Dr.
ADDRESS

School now attending: Haynes

School zone in which you live: Bordeaux

PLEASE CHECK *ONE*

☐ I request permission for this child to stay at Haynes (name of school)

☐ I request permission for this child to be TRANSFERRED on January 20, 1961 to Bordeaux (name of school)

.....
SIGNATURE OF PARENTS

REMARKS: .....

.....

[fol. 495]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF HEARING—January 10, 1961

JOSEPH R. GARRETT, called as a witness in behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Dodson:

Q. For the record, please state your name?
A. Joseph R. Garrett.
Q. Mr. Garrett, your age?
A. Thirty-nine.
Q. Your residence?
A. Davidson County.
Q. Your occupation?
A. Attendance teacher in charge of child welfare and attendance, Davidson County Board of Education.

. . . . . .

Q. Now, I want to get, then, to the question of the notice following the decree of this Court and the adoption of the plan, what did you then do with respect to school zones and what part did you plan in it?
A. We followed the Court order to establish zones. My assistant, Mr. Higgins and with the cooperation of other staff members, Mr. Detchon, of the research department, Mr. Turner, Director of Transportation was consulted, and we therefore set out to establish these zones which had never been established around the Negro schools.
Q. Were those zones established with regard to race or without regard to race of the students?

The Court: There is nothing before the Court on that. [fol. 496] Mr. Dodson: Well, that is preliminary, really, to my next question.

By Mr. Dodson:

Q. There were established in accordance with a directive without regard to race?

A. That is right.

Q. All right. Now—

A. Certainly.

Q. When that had been done, then what did you do with respect to seeing what children were affected?

A. We immediately obtained the names of those children that would be affected and started to work on notifying the parents of these children.

Q. How many did you find would be affected, approximately?

A. Two hundred and eighty-eight White children and 405 Negro children of grades 1 through 4 became affected in this new zoning.

Q. Did you then attempt to do anything with respect to notification of the parents of those affected?

A. Yes, sir, we consulted with our attorneys and formulated notices and letters to give these people information relative to their zone that they are now in.

Q. And I believe the first letter that went out, dated December 5, 1960, with the transfer request attached, was the one that I went over with you in its entirety, changed in some respects and approved and told you to send it. Is that right, sir?

A. That's right.

Mr. Dodson: If Your Honor please, I offer this.

The Court: Let it be exhibited and made a part of the record.

Mr. Dodson: All right, sir, we file that as Defendant's Exhibit No. 2.

[fol. 497] The Court: Hand that to me and I will mark it.

(The document referred to was received in evidence as Defendant's Exhibit No. 2.)

By Mr. Dodson:

Q. Now, Mr. Garrett, that form that you used—do you have one there in front of you so that you might refer to it as we go along? If you don't, I will get you one.

A. All right, sir.

Q. That form that you used provides for it to— How was it sent out, first, to the parents?

A. It was sent out to the— We had conferences with the principals and they, in turn, had conferences with their teachers, and it was sent by the teachers to the parents—by the child to its parents.

Q. All right, sir. How do you send all other notices to parents in the public school system?

A. Of zone changes and so forth, when they become necessary, it is usually indicated on their transfer ordinarily, which the child carries to its next school.

Q. Well, I mean, how do you generally get messages, general messages to parents? Is it by means of the children?

A. Most every time. We have to use that system.

Q. It is a lot less expensive?

A. That's right.

Q. And a lot more complete, isn't it?

A. It facilitates things, and it is more effective.

Q. Now, I notice you requested the parents to sign that. Is that right?

A. That is correct.

Q. Why did you do that?

A. We wanted to make sure that every parent knew of their new school zone.

Q. All right, sir. Did that letter and notice set out what [fol. 498] the new school zone was?

A. That's right. We filled that out at our office.

Q. Now, this particular letter went only to those who were affected by virtue of the zone changes. Is that correct?

A. That is correct.

Q. All right, sir. Now, it has two different places to indicate an optional choice. Is that correct, sir?

A. That is right.

Q. All right, sir. What is the first one? What is it designated for?

A. Request permission for the child to remain at the school it is now attending.

Q. In the absence of some request for the child to remain in the school that it was then attending, what would have happened?

A. Will you please state that again?

Q. The child had now been zoned to another school. Is that right?

A. Right.

Q. Now, in the absence of some request from the parent for the child to remain where the child was, what would have happened to that child?

A. That child would automatically become in that zone.

Q. Automatically come in the other zone?

A. That's right.

Q. All right. So that had to do, then, with the request for not being placed in the zone that you would otherwise have to go to. Is that correct?

A. That is correct.

Q. And I asked you that because I will get back to it in a few minutes.

Now, the other one had to do with what?

A. Request permission for the child to be transferred on January 20, 1961.

Q. Now, the use of the word "transfer" is there. What does that word designate in the Davidson County and other [fol. 499] educational systems?

A. Well, "transfer" as required by our state registers, and so forth, any child leaving one school and going to another school is called a transfer and must be so listed and so recorded in the state register.

Q. You have to advise the State Department of Education of a transfer, do you not?

A. That is right.

Q. Regardless of the reason that the child goes from one school to the other?

A. That's right.

Q. Whether it has anything to do with the Court order or not?

A. It is on that final report at the end of the year how many transfers we had. Those are listed separately.

Q. Now, then, the second box has also the word "permission" or something to that— What is the word used there?

A. "Request permission."

Q. "Request permission." All right, sir, I want to know why in our discussion out there, we used the words "request permission." What happens, in other words, when a child is transferred from one school to another during the school year? What right do they have under the existing law?

A. They have to make some indication that they want to move, either orally, or verbally, or written or otherwise. We have to know or have something to initiate this move of this child.

Q. Suppose that under normal zoning, not having to do with this case at all, a child is removed from one school zone and placed in another school zone, does that child have any right to hearings?

A. Oh, yes.

Mr. Williams: I object to leading questions, if Your Honor please, to have this gentleman testify as to what the rights of the child are.

[fol. 500] By Mr. Dodson:

Q. Well, have you had any hearings about children being moved?

A. Yes, we have in the past.

Q. Long before this case got in this Court?

A. Yes, sir.

Q. It had nothing to do with race or anything else for that matter?

A. That is right.

Q. All right, sir. Now, of those that were sent out, this particular form, did you have any calls, or not, requesting clarification from any of the parents as to what you meant?

A. There were calls, I think a few to the principals.

Q. All right, sir.

A. They clarified it or they, in turn, asked us and we then clarified it through them. I think it is very clear, to start with.

Q. How many of these did you get back by virtue of using this system?

A. We got back every one except one.

Q. All of them except one with an indication and a signature?

A. That's right.

Q. Is that correct?

A. That is correct.

Q. All right, sir. Now, do you recall who that was?

A. It was the Driver children. The Driver parents did not return theirs.

The Court: How many were sent out in all?

The Witness: Two hundred and eighty-eight, plus 405.

The Court: Plus 405. All right.

By Mr. Dodson:

Q. Six hundred ninety-three?

A. Six hundred ninety-three.

Q. And you got back 692?

A. That is correct.

[fol. 501] Q. Now, before you knew how many you were going to get back, what had you planned as your next step as to those that you didn't hear from?

A. We had planned to notify them then by mail and by securing the addresses and addressing the addresses on the envelope and mailing to that particular parent.

Q. I want to ask you this: Out at the central office, do you keep the parents' names and addresses, or is that kept at the schools, or where?

A. All the current records are at the school. We have the graduate records and maybe those that are transferred out of the state, but we do not have a complete record at our office.

Q. And then when you originally intended, your original plan, to use the United States mail and then if you didn't hear, what were you going to do?

A. We would then give a special notice to that particular parent.

Q. All right, now, when you got back all except one, did you go through the second step (that is, using ordinary

mail) or did you go on to the third step using registered mail?

A. We just went ahead and used registered mail, since there was only one family involved, and we wanted to make sure that family was notified. It was so few involved, why, we used registered mail.

Q. And I want to ask you if there was then sent by registered mail a letter to the Driver parents?

A. Yes, sir; it was.

Q. With the same sheet attached?

A. (Nodding affirmatively.)

Q. For both of the children of the Drivers?

A. Yes, sir.

Q. And did you get a United States return receipt for the delivery of that letter?

A. Yes, sir.

[fol. 502] Q. So do you now have in your files either the signed statement of the parents that they have gotten the notice or this registered return receipt from everybody affected?

A. That's right.

Q. Do you need to retain this, or can you file this (showing document to the witness)?

A. I can file it.

Mr. Dodson: We would ask, then, that this be made Defendant's Exhibit No. 3, may it please the Court.

The Court: Let it be admitted.

Mr. Dodson: Letter to the Drivers dated December 19, 1960, and return receipt attached.

(The document referred to was received in evidence as Defendant's Exhibit No. 3.)

By Mr. Dodson:

Q. Now, Mr. Garrett, on all of those who requested that their children be permitted to remain in the same school so that, in effect, they would not be going to the school to which they were zoned, did the Board of Education act on those requests?

A. Yes, they did.

Q. Were the parents advised of the action?

A. They have been advised that their transfer or request to remain at that school has been approved.

Q. By letter, or how?

A. By letter.

Q. And the date of the letter?

A. The letter is January the 6th.

Q. 1961?

A. Yes.

Q. Do you have a form of that letter?

A. Yes, sir.

Q. Will you file that, then, as Defendant's Exhibit No. 4?

A. Yes.

[fol. 503] Mr. Williams: May we see that?

Mr. Dodson: Yes, I will give you a copy, here. I thought you had it.

The Court: Let it be admitted.

(The document referred to was received in evidence as Defendant's Exhibit No. 4.)

By Mr. Dodson:

Q. Now, then, what did you do with respect to those who wanted to go to the school in which they were zoned and which, according to your records, would be transfers? Did you give them any communication?

A. Yes, we did. We gave them a letter giving them more or less directions to turn in their books and check, clear their textbook record and whatever other materials that they needed to check in at their particular school, so that they would get ready to clear out January the 20th.

Q. Do you have a copy of that?

A. (Handed document to counsel.)

Q. Will you file that letter with the blanks? The blanks were filled in, of course?

A. Oh, yes; they were filled in.

Q. All right. Will you file that letter as Defendant's Exhibit No. 5?

A. Yes.

The Court: Let it be admitted.

(The document referred to was received in evidence as Defendant's Exhibit No. 5.)

By Mr. Dodson:

Q. Now, then, subsequently (I don't know that it is subsequently, but in any event) I had first advised you, I be- [fol. 504] lieve, that these were all the letters we needed to send, hadn't I?

A. That is correct.

Q. Did I change my mind about that?

A. Yes, sir; you did.

Q. And tell you you had to send them to everybody?

A. Yes, sir.

Q. Did you send them to everybody?

A. Yes, sir. They are in the process now. They have already left our office and they are in the process of being—everyone being notified, the remaining group.

Q. And that is going to the people who are still in the same zone that the new zoning didn't affect in the least?

A. That's right.

Q. Does it serve any useful purpose that you know of?

A. No, I cannot see— In fact, I can see where it can actually hurt us, because—or hurt desegregation in the fact that it may get some peopl aroused that are not affected really.

The Court: This goes to everybody?

Mr. Dodson: Yes, sir, even though they are not affected in the least.

By Mr. Dodson:

Q. Do you have a copy of that letter?

A. (Handed document to Mr. Dodson.)

Q. Will you file that as Defendant's Exhibit No. 6, and I believe there are what, 45,000 or so of these that you have to send?

A. Forty-five, plus or minus. I couldn't give you an exact figure on that.

[fol. 505] The Court: Let it be admitted as Defendant's Exhibit 6.

(The document referred to was received in evidence as Defendant's Exhibit No. 6.)

The Court: Now, this was sent after this motion was filed, wasn't it? It is in the process of being sent now?
Mr. Dodson: It is in the process of being sent now.

By Mr. Dodson:

Q. I believe the notification to you was before the motion, was it not, or do you recall?
A. I don't recall, but we—as soon as we could get to it. I would say that, we had—
Q. You took care of the urgent ones first?
A. We have been working overtime now to even get the others.

The Court: It was sent January 10, 1961. It's dated January 10th?
Mr. Dodson: Dated January 10th.

By Mr. Dodson:

Q. Has it actually gone out from the schools, or do you know?
A. It is going out today.
Q. Going out today. Could you get to it any sooner?
A. No, we could not. We had the holidays, and schools were closed, and we have had very few operating days, actually, since that time.

Mr. Dodson: You may examine.
The Court: Cross-examine.

[fol. 506] Cross examination.

By Mr. Williams:

Q. Mr. Garrett, you are familiar with the plan which was proposed by the Board to this Court?
A. I think so.
Q. You had a part in the preparation of that plan?
A. Well, I had a part, yes.
Q. Are you familiar with paragraph 1 of that plan which

states that compulsory segregation based on race is abolished in grade 1 of the Davidson County schools for the scholastic year beginning September '61, and so forth?

A. Yes, sir.

Q. Then, Mr. Garrett, why was it that this letter did not inform the parents, even the affected parents that you sent it to, that compulsory racial segregation was abolished and that they, therefore, had the right to attend schools under nonracial zoning?

. . . . . .

Q. I will ask you, Mr. Garrett, why you did not, in your letter, state that you were giving the parents specific notice of the zone in which their children now fall for the purpose of attending classes?

A. I would think that my letter states that.

Q. Will you refer me to some point in there where, according to your interpretation, your letter states that? It certainly doesn't state it literally.

A. In our letters to parents, we have found that you have got to be as brief as possible.

The Court: Let me see that first letter. I think there is something in there, the one that had the form attached to it. [fol. 507] Mr. Dodson: Here it is. Exhibit No. 2.

Mr. Williams: I attached one as an exhibit to my motion, if Your Honor please, the Drivers'.

The Court: Yes. What is your last question there, why you did not do what?

Mr. Williams: Counsel had stated that all that they were trying to do was to follow the direction of the Court to give specific notice to the parents of the zone in which their children fall for the purpose of attending classes. I think the language of the Court was "to the parents of all school children of the zone in which their children fall for the purpose of attending classes."

By Mr. Williams:

Q. Now, nowhere in this letter, Mr. Garrett, can I find anything like that. And I am asking you, sir, if you will point out to me some part of the letter that you construe as being that?

A. Do you understand that we filled these forms in and stated Bordeaux School? We stated the school.

Q. Is your answer to the question that the fact that you attached a— his transfer request constitutes a compliance with that order of the Court?

A. Yes. It's filled in properly. It does. Of course, the blank form, no, but we filled those in and stated very specifically the grade. We even circled the grade, if you will note there at the top, which indicates that grade 1, 2, 3, 4 had been desegregated, as ordered by the Court.

Q. Mr. Garrett, was it your understanding that under the plan and under the Court's order that children who were [fol. 508] living in the zone in which they fall for the purpose of attending classes under this plan would have a right to attend that school?

A. Yes, they would have a right.

Q. Well, will you kindly, then, if you please, sir, explain why you have down in the final paragraph here, "consideration will be given to your choice indicated on the transfer request"?

A. Well, knowing that a lot of them, as you stated even in the last hearing, a lot of them would request not to be transferred, would request to attend the school they are now in. So, therefore, we gave them that opportunity, and also this request form did more. It gave us an opportunity to make—to get things ready, to organize, to have conferences and hope for an orderly desegregation January the 23rd. It was a study. You have to plan these things.

Q. Well, now, Mr. Garrett, but you have it just reversed, your forms, though. You have it so that a parent would understand that he was transferring his child to the zone in which his child falls for the purpose of attending classes, and that you must approve that, do you not, sir, on these two documents taken together?

Mr. Dodson: May it please the Court, I am going to object to this line of examination. It us purely argumentative. The papers speak for themselves. Whether they are clear, whether they comply with the Court's order, or don't comply with the Court's order, is not in the opinion of this man. It is in the opinion of the Court. I have given my opinion

about it, because I was the one that approved it and thought in fairness to the school staff and board they should not be charged with it. But whether or not it does is a decision for [fol. 509] Your Honor, and what this man thinks about whether it does, it seems to me, is totally immaterial.

The Court: Of course, the Court has to finally decide the question, but any enlightenment that he might give the Court or any explanation about it would be helpful, I'd say.

Mr. Williams: That's all I'm asking him, if Your Honor please. I would like his interpretation.

The Witness: Would you think that our letters that we sent out, which we stated gave directions to that parent that made a request to go to this White school? We didn't tell him he would have to get a transfer. We told him to check his books in, but he is still considered a transfer. Our state records or register, if you are familiar with that, it requires that child to be so-called a transfer and must be put a "W" and a transfer on the re-entering register in the same administrative unit.

By Mr. Williams:

Q. Mr. Garrett, directing your attention to the second paragraph of your letter, in which you state, "Please mark a transfer request for either (1) permission to remain in the school he is now attending," now, that refers to remaining in the segregated schools, doesn't it?

A. Yes, sir.

Q. "or, (2) be transferred January 20, 1961, to the newly zoned school." Now, the newly zoned school refers to the desegregated school, doesn't it?

A. We did not say "permission." We just said, "be transferred."

Q. Yes, sir. But now you want to change your statement, do you not, sir, that you didn't tell him he'd have to be [fol. 510] transferred?

A. It is indicated as a transfer, yes, because he is leaving one school and going to another.

Q. Yes, sir. And in your final paragraph of that letter you stated, "consideration will be given to your choice indicated on the transfer request," did you not, sir?

A. Yes.

Q. Would you, under your interpretation, construe that as indicating to the parent that you would have to approve either of these things?

A. Well, we knew that more of them would ask to remain, or at least we thought they would, which it turned out that way.

Q. I am not asking as to your motive, but it is true that this last paragraph of the letter indicates that you would have to approve either of those things, doesn't it?

A. Not official board approval. It's just consideration, such as planning, and so forth, and getting ready for that child to enter this White school. We might need a teacher.

Q. Now, Mr. Garrett, will you cite me to the state law or the state regulation which requires that on this notice that you were ordered to give here by the Court you were required to state to the child who was being rezoned that he was being transferred to the rezoned school?

A. Well, it's not a state directive, I suppose, but—I don't suppose I can. But he must be listed out—I don't suppose I could cite him any specific wording on that at this time.

Q. And even if there were such a state administrative directive, that would not require you in this letter to mislead the parent by making him think he was being transferred.

Mr. Dodson: Object to the question, may it please the Court.

[fol. 511] Mr. Williams: All right, sir, I will withdraw the question, if Your Honor please.

By Mr. Williams:

Q. Now, you are Director of Child Welfare and Attendance?

A. Yes, sir.

Q. Mr. Garrett, you have overcrowding at many, many, many schools, do you not, in your school system?

A. That is true.

Q. Yes, sir. And where a transfer of a child is indicated on account of some valid administrative reason, the fact

that a school is overcrowded does not necessarily mean that he cannot possibly be admitted to that school, does it?

A. No, sir.

Q. Now, you said that you had several calls to principals asking for explanation of these forms?

A. Only a few, I said.

Q. Only a few?

A. I think one or two or three cases, very few. I think this letter must have been rather clear.

Q. Well, how many Negro children stayed in the new zone? How many Negro children under your provision transferred to the newly zoned school?

A. Fifty-one have indicated that they would like to attend the White school in their zone.

Q. Well, Mr. Garrett, how, then, can you be so sure that your letter was clear?

A. Well, as previous records indicate, about 10 per cent of those eligible usually attend White schools, as you have indicated even in some statements before, so it figured out just about correct, about 10 per cent.

Q. Well, that 10 per cent figure came from Nashville where they had an even worse system of notification than [fol. 512] you had, didn't they? Sir?

A. I don't know anything—I'm not familiar with the Nashville system too well, but that is their system of notification.

Q. And, as a matter of fact, presumably the Court ordered this notification in an attempt to make sure that that was correct. Is that true?

A. I don't know why they did that.

Q. But you still felt like if you got the 10 per cent, that made—that this notice was clear?

A. Well, we got a little over 10 percent. Maybe we did a pretty good job there.

The Court: How many were there?

The Witness: Fifty-one out of 405, which runs about 12 to 15 per cent.

By Mr. Williams:

Q. Let me ask you, Mr. Garrett, why did you put first, "permission to remain in the school which you are now attending" and put second, "be transferred to the newly zoned school"?

A. Well, I think that is just a matter— Either one could have been listed. I had that not in mind. The people and different ones helped to formulate the letter. Our lawyers approved it and helped with some of the wording. I don't think that would have been a factor either way, that is, which order they came in.

Q. That just fell naturally?

A. Because it stated so plainly what it was doing.

Q. All right, stated so plainly. It is your interpretation that this letter "advises any parent of his right to attend a desegregated school"?

A. Yes, of those affected.

Q. Where is the word "desegregated" in this letter, or in the transfer request?

A. Well, I am sure that the people that are living there [fol. 513] will know that school will be desegregated.

Q. You just assume that?

A. Surely.

Q. One more question, Mr. Garrett. Why is it that on the transfer request directing your attention to the second choice which you have designated as, "I request permission for this child to be transferred on January 20, 1961, to" (Name of school). Why is it that you have the word "transferred" in capital letters underlined?

A. Because that child will—that child will become a transfer and must be transferred on all registers and must be given said transfer in order to clear books and grade placement. That teacher might not know the grade that that child is in. He needs something to take along with him to this new school.

Q. The parent wouldn't be the one who would transfer those books, would he?

A. He would see that his child turned them in at the proper school.

Q. Yes, sir; but it was your plan to send this second

letter, which you have sent, then, informing the parent that it was necessary for his child to see the principal and have his records transferred. Isn't that correct, sir?

A. I think that is good administrative— We are trying to inform the people as to what direction to go in.

Q. Yes, sir. In view of that, however, it was unnecessary to include the word—to magnify the word "transferred" or even include it in your original notification giving the parent a choice of remaining in a zone to which he is assigned and calling that a transfer. That wasn't necessary, was it, Mr. Garrett?

A. Well, it could have been left out, I assume, and have had the same weight.

[fol. 514] Q. Would you agree that it would have been much clearer in terms of a choice if a parent were informed that under your plan, segregation in these grades was abolished, that he now had the right to attend the school in the zone in which he fell for purposes of attending classes and that if he wished, according to the terms of your plan, he could make a transfer to the school that he is now attending?

A. I think the term "transfer" there indicates even to the average man on the street, that is, moving from one school to the other, the reason we used the word "transfer." Even the Negro child moving, they still speak of getting their transfer from said school.

Q. And you plan or hope to follow the same notice in the future in giving these notices at the beginning of the year, I assume, Mr. Garrett. Is that correct?

A. We will be instructed by our Board of Education, I suppose, on that.

Q. Mr. Garrett, why did you tell the parent that he had to return this within three days?

A. Well, on—various notices go out. We know if you say a week or ten days, they will get in the wastepaper— We had a few lost as it was and had to replace them. We know the quicker we can get them back— They will lose them. We had to replace some. And then, too, time was running short on us. We got these things back, and then we had to do some study and preparation. The other departments of the Board of Education, Mr. Wright and his

department, I am sure had work—or will work them here after we know how many are coming.

Q. You plan to continue in the future requiring them to be returned in three days?

A. Well, time was an element here; whereas, it may not be in the next case.

Q. Mr. Garrett, will you concede that of the some 250—[fol. 515] No. That would be some 340 Negro parents who, under your representation to the Court, have now elected to remain in the school in which they remain might very well not ever know that the Court not only ordered rezoning, but approved a desegregation plan? You will concede that that might be true under these notices, won't you?

A. No.

Q. You won't concede that?

A. No, sir.

Q. Tell me how you can be assured that these parents know that?

A. Because it stated the school zones to which they were zoned in a very simple form, to me.

Q. I see. Did you have any calls from Negro parents, or do you know?

A. Well, of course, some calls come to our office when we are out, as we are today, but to my knowledge, we have not.

Q. Now, this method of notification, you sometimes mail notices directly to people, don't you?

A. Yes, when time is

Q. You didn't feel this was of sufficient importance to mail it directly to the parents?

A. Well, we felt, too, that we could- ince time was an element, that we would get our notice ack and be ready to make preparation for January 20th; whereas, some of those notices would be trickling in even all the way up to the 23rd.

Q. You had card addresses on all the parents, didn't you, in the principals' office?

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[fol. 516]

In United States District Court

Findings of Fact, Conclusions of Law and Judgment—January 24, 1961

This cause came on to be heard before the Honorable William E. Miller, District Judge, without the intervention of a jury, on January 10, 1961, upon the entire record, and especially upon the motion for further relief and the motion for new trial and for appropriate relief heretofore filed by plaintiffs, upon the merits of the cause as to the issues heretofore reserved by the Court, upon the motion to intervene in the cause filed by Porter Freeman, individually and in behalf of others, the testimony of witnesses heard in open court, and briefs and arguments of counsel, from all of which the Court finds and holds as follows:

Findings of Fact

1. With respect to the notices furnished by the defendants to parents of school children affected by the desegregation plan heretofore approved and the parents of all other children attending the schools in Davidson County, the Court finds that such notices are not confusing or misleading and further finds that there has been no showing of any confusion or misleading as a result of the form of the notices.

2. The Court finds that to grant the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr. and Benjamin Grover Maxwell to be admitted to schools as exceptions to the plan approved by the Court would in effect destroy the plan in this locality.

3. The Court finds that teachers and sustaining personnel are assigned to the schools based upon their particular aptitude, qualifications, background and other factors, all [fol. 517] of which are considered by the Board, and that one of these factors has been race.

4. The difficulties and problems which will be encountered in making the transition from a segregated system to

a nonsegregated system would be enhanced and complicated if the Court should at this time require the assignment of teachers and supporting personnel in the schools of the system on a basis different from that which has heretofore been followed. It would in all probability lead to a situation where a plan which would otherwise be successful and would operate smoothly and harmoniously would be impaired and rendered unworkable.

Conclusions of Law

1. The Board of Education acted in good faith in preparing the notices to parents under the desegregation plan and in mailing and distributing them. The School Board and the attorney representing the School Board and all of the defendants acted in good faith in undertaking to carry out the order of the Court and the Court holds that they did so in substantial effect.

2. The notices to parents heretofore furnished by defendants to said parents under the desegregation plan were adequate. The Court finds no objection to them.

3. The notices to parents should be given to those who are affected by said plan of desegregation and not to anyone else, but the form of the notice in the future should be submitted to opposing counsel in advance of its mailing, giving them sufficient time to file objections with the Court; [fol. 518] and the Court will impose that requirement, believing that it is reasonable.

4. With respect to the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, to be admitted to schools as exceptions to said desegregation plan, the Court is of the opinion that to grant such exceptions would be in effect to invite the destruction of the very plan which the Court has held is for the best interest of the school system of Davidson County. It is not a plan which is designed to deny the constitutional rights of anyone. It is a plan which is designed to effect an orderly, harmonious, and effective transition from a racially segregated system to a racially nonsegregated system of schools, taking into

account the conditions existing in this particular locality. And the Court cannot see how these individual plaintiffs who brought this action are or would be entitled to any different treatment from any other children who attend the schools of Davidson County and are members of the class represented by the plaintiffs.

5. With respect to the issue reserved by the Court on the merits, as to whether or not there is any violation of the rights of the plaintiffs or of those represented by the plaintiffs where teachers are assigned in the County School System on the basis of race or where race is used as a factor in making assignments of teachers, the Court cannot go so far as to agree with the argument that this question has been finally settled by the decision in the Brown cases. But the Court does entertain the view that this question is a serious question under the Equal Protection Clause of the Fourteenth Amendment. Particularly is this true when [fol. 519] the Court considers the fact that a plan has been approved for Davidson County which includes a very liberal transfer provision. When this provision, although it is on a voluntary basis, is coupled with a policy (and the Court is not now finding that this policy exists in Davidson County) which would assign teachers on the basis of race, then a serious question is presented to the Court as to whether there is not actually being thereby perpetuated the very condition which the Supreme Court said could not be perpetuated, and that is a segregated system of public schools. The Court is required to view the matter in terms of the entire school system, and in terms of the quality of education which the students are entitled to receive.

6. The Court finds that it is not necessary to determine the question relative to the assignment of school teachers and other personnel at this time for the reason that the Court does not believe (even if it should now hold and declare that the plaintiffs do have the right to attend a school system where race is not one of the factors considered in the assignment of teachers) that an injunction should issue at this time.

7. In the opinion of the Court, it is the better and wiser course for the Court to follow, even if the foregoing rights

were declared as contended for by the plaintiffs, to withhold the granting of an injunction until the plan has had an opportunity to operate for a substantial period of time. The school authorities should have the benefit of experience in dealing with the operation of integrated schools. For these reasons, in the exercise of the Court's discretion, the Court would deny injunctive relief in this respect at this time.

[fol. 520] 8. This case will remain on the docket of the Court, and the Court will retain jurisdiction of the case during the period of transition; and the question with respect to the assignment of teachers, principals, and sustaining personnel can be renewed by the plaintiffs at a later date, and will be taken up and considered at that time, after the plan has had an opportunity to be operated for a substantial period of time.

9. The motion to intervene filed by Porter Freeman individually and in behalf of others, is not well taken for the reasons, first, that it comes too late; second, that it is contrary to the plan which the Court has already approved; and third, that it contemplates putting into effect a plan which has specifically been held to be unconstitutional by this Court and by the Court of Appeals of the Circuit. For these reasons the motion to intervene is not well taken and will be denied.

JUDGMENT

It is accordingly Ordered, Adjudged and Decreed as follows:

1. That the relief prayed for in the motion for further relief filed by plaintiffs be and the same is denied, with the exception that the form of the notices to parents in the future are directed to be mailed by defendants to counsel for plaintiffs in advance of mailing, so as to give them sufficient time to file with the Court objections to the form of said notices.

2. The aforesaid notices to parents will be given to those who are affected by said plan of desegregation heretofore approved by the Court and not to anyone else.

[fol. 521] 3. The motion for a new trial and for appropriate relief filed by plaintiffs is overruled and denied.

4. Injunctive relief with respect to the issues heretofore reserved by the Court concerning assignment of teachers, principals, and sustaining personnel in the schools on the basis of race is denied at this time; and the Court further reserves ruling with respect to the assignment of teachers and other school personnel, including the right of school children or their parents to raise such question.

5. This case will remain on the docket of the Court, and the Court will retain jurisdiction of the case during the period of transition from a racially segregated to a racially desegregated school system. The question with respect to assignment of teachers, principals, and sustaining personnel may be renewed by the plaintiffs at a later date. It may be taken up and considered at that time after the plan has had an opportunity to be put into operation for a substantial period of time.

6. The motion to intervene filed in this cause by Porter Freeman is overruled and denied.

To the foregoing action of the Court in denying their motion for further relief and their motion for new trial and for appropriate relief, and in denying the relief prayed for in the complaint with respect to said issues heretofore reserved by the Court, the plaintiffs respectfully except.

This the 24 day of January, 1961.

Wm. E. Miller, United States District Judge.

[fol. 522]

In United States District Court

Notice of Appeal—Filed February 20, 1961

Notice is hereby given that the plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, by next friend, Reverend Henry C. Maxwell, Sr., and Mrs. Flora Maxwell; Deborah Ruth Clark, by next friend, Joe E. Clark and Mrs. Floy Clark; Jacqueline Davis, Shirley Davis, George Davis, Jr., Robert Davis, and Rita Davis, by next friend, Mrs. Robbie Davis; Robert Rickey Taylor, by next friend, Robert Taylor and Mrs. Stella Taylor; Reverend Henry C. Maxwell, Sr., Mrs. Flora Maxwell, Joe E. Clark, Mrs. Floy Clark, Mrs. Robbie Davis, Robert Taylor, and Mrs. Stella Taylor, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit from the judgment entered in this action on the 23rd day of November, 1960, and from the judgment denying plaintiffs' motion for new trial and appropriate relief, and denying other relief to plaintiffs, entered in this action on the 24th day of January, 1961.

Z. Alexander Looby and Avon N. Williams, Jr., 327 Charlotte Avenue, Nashville 3, Tennessee, Thurgood Marshall and Jack Greenberg, 10 Columbus Circle, Suite 1790, New York 19, New York, Attorneys for Plaintiffs-Appellants.

[fol. 523]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14,607

HENRY C. MAXWELL, JR., et al., Plaintiffs-Appellants,

v.

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al., Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Appendix to Brief of Defendants-Appellees —Filed September 14, 1961

[fol. 524]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

WILLIAM HENRY OLIVER, a witness called on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Luton:

Q. This is Mr. Oliver?
A. Yes, my name is William Henry Oliver.
Q. What is your profession or occupation, Mr. Oliver?
A. I am Superintendent of the Nashville City Schools.
Q. And how long have you been Superintendent of the Nashville City Schools?
A. I became Superintendent of the Nashville City Schools

officially on the first of January, 1958. Prior to that time, I had served for six months as Assistant Superintendent.

Q. Now, prior to your being Assistant Superintendent, what did you do, Mr. Oliver?

A. I had been at East Nashville High School for 25 years, the last 18 of which I served as principal. Prior to that I had taught two years at Hume-Fogg High School. Prior to that I had had two or three years' experience teaching elsewhere.

Q. So that, I believe, adding up all together, you have about 30 years' experience as an educator. Is that correct?

A. I have had 30 in the Nashville City Schools and two and a half outside of the Nashville City Schools. Really 32½ years—33½, excuse me.

• • • • • • •

Q. Can you identify that document that I handed you there? Is that a photostat of one of your official records?

A. This is a copy of the enrollment in my schools, all of the schools. It just happens that I had a meeting of [fol. 525] my supervisors staff this morning and read to them all these figures; and as I look at these now, they seem to be quite correct. I don't believe this is a photostatic copy, but I think that the figures are correct. And according to this, we have 17,372 White students.

Q. And how many Negro students?

A. And 12,815 Negro students, giving a total of 30,187. I think those figures are correct, sir.

• • • • • • • •

A. Mr. Attorney, may I take the liberty of saying that I think that the Court made a very wise decision and that our experience with the plan has justified my feeling. Excuse me for taking the time. Thank you.

• • • • • • •

Q. Now, Mr. Oliver, as His Honor has just indicated, and we do want you to elaborate on that, with respect to the feature of the City Plan which has to do with transfers, that is, the transfer upon application of a student. Will you state to His Honor whether there have been transfers

or applications, therefore, from either race pursuant to that provision?

A. There have been many transfers. The plan provides for transfers. I don't want to take up too much time, but maybe I should state this: According to our plan, every elementary school has a zone, and that zone is established without regard for race. Each school has a zone of its own, and the doors of the schoolroom in that zone are open to all children who live in that zone, regardless of race.

Now, in many of our zones we have both White and Negro children. In some we have a great majority of Negro children and in others we have a great majority of White children. We offer a child or his parents the privilege of requesting a transfer from that zone to some other zone if the parents of a child prefer that the child attend [fol. 526] school with members of his own race. In other words— Now, these are not the only reasons, but these are some of the reasons for transfer. If a child is in the racial minority, either in his class or in his school, he, through his parents may request a transfer to some other school outside of that zone, in order that he may be in school with other children of his own race.

The way it works is: The transfer is granted for one year at a time. The student can change his mind after one year if he wants to. In other words, if there is a Negro child in a White school zone, let us say, he has a choice each year as to which one he attends. He is not bound one year by the choice of another year. The first year, for instance—I remember the figures very well. The first year, we had 115 little Negro children who were eligible in the first grade to attend White schools. A hundred and five of them requested transfers. The other ten went to the schools in the zones in which they lived where most of the children were White. We had 55 White children living in what we might call the Negro school zones, and they all asked transfers, and they were granted.

Now, we think that through the press, radio, television, and through the principals and teachers, everybody in our community knows our plan rather well. We do not send individual letters or notices to children's parents telling them what zone they are in. We thought of doing that,

but we were afraid that someone might think that we were trying to influence parents one way or another as to where they sent their children to school. So we didn't do it. We never have done it.

Furthermore, we do not require the child to go in person to the school from which he wants a transfer. The reason for that is: You take a White school in whose zone there are just maybe three or four little Negro children. It is embarrassing to those children, and originally [fol. 527] it might have been dangerous for them to go to this school in person to ask for the transfer. We say to the parents: "Send your child where you want the child to go, and if that is a school in whose zone the child does not live, then the principal gives the child a transfer request card to take home. His parent signs the card and sends it back to the principal, and the principal sends it to the superintendent, and the superintendent passes on the request. I might say that I personally have passed on every request for transfer that has ever been made in the Nashville City Schools, and I have granted the requests which have been made.

I don't know whether I have made that clear or not, but I want it to be clear that the parent has an absolute choice as to whether his child attends school in the zone in which he lives or not. He has the right to go there. If the parent thinks it is to the interest of the child to go to a school in another zone in order to be with children of his own race, the parent may request permission for the child to be transferred and get it. If that isn't clear, I would appreciate your questioning me further on it.

Q. Mr. Oliver, I think you have made it abundantly clear. The sum and substance of it all is that in compliance with the plan, you have made it voluntary for those who want to avail themselves of that voluntary feature.

* * * * * * *

The Witness: Well, I think that the smaller the child is, the younger the child is, the less the problem of adjusting to the new situation. Of course, we have had a number of children who started in desegregated schools who had never been in a segregated school, and our records

indicate, and our observation convinces us that they achieve normal success; whereas, others who have transferred [fol. 528] from, let us say, a segregated to a desegregated school later, have had more difficulty in adjusting themselves socially and scholastically. *I think that the problem* is less at the beginning than it is higher up.

• • • • • • •

Cross examination.

By Mr. Williams:

Q. Now, your plan says that a student may—that if his parents or guardian make written application for him to transfer to a school outside a zone, that request will be given consideration and granted and then a subsequent paragraph of your plan which is exactly the same as the Davidson County plan, sets forth these racial criteria based on the majority or minority in the classroom or in the school. That's correct, isn't it?

A. As some of the reasons which may be offered for a request, that is right.

Q. Yes, Mr. Oliver, will you explain to the Court how it becomes a transfer if a Negro child who lives in the zone for Warner and who has been attending Elliott, or, rather, who would have attended Elliott under your separate Negro zoning system, how does it become a transfer if he is just permitted to go on to Elliott without ever having seen Warner, as a matter of fact, without having known that he was zoned in Warner?

A. Well, he has to get a transfer. A student has to get a transfer from one school district to another, even if he hasn't been to one school.

Q. Then, what you mean by transfer is that it's a transfer made on paper and it's made at the segregated school to which he goes, isn't it?

A. A transfer, of course, is made on paper.

[fol. 529] Q. Yes, sir.

A. Any transaction of that kind is. The student doesn't have to have it made at the segregated school to which he goes. He may go to the school in his own and get it

there if he wants to. We don't require them to go there. We are just, of course, trying to protect them from embarrassment and danger, but a student may go to a school in his own zone to get his transfer if he wants to.

Q. While you are on that, Mr. Oliver, is it your opinion that it facilitates peaceful desegregation for the public officials who are attempting to carry out desegregation to be always talking about protecting somebody from danger and that there might be danger and there might be violence? Is that your opinion as an expert?

A. I think I'd be very foolish and blind not to recognize that there was some danger, and I think that I would be rather thoughtless of the children if I hadn't tried to devise some way to protect them from it. Now, this plan was started in 1957, and I think there was abundant evidence that there was some danger.

• • • • • • •

A. It's not just a matter of which school a child lives closest to. You can't just draw the boundary lines exactly midway between schools, but I would say this: If your child lives inside the City of Nashville, he lives in the zone of some elementary school. I don't know which one. It doesn't matter. But the whole city is zoned, and if you live inside the city, your child lives in some elementary school zone. Regardless of what school zone that is, your child may attend that school.

Now, if that happens to be a school in which your child would be in the racial minority, you may ask for a transfer for him to go elsewhere if you wish. Is my answer clear?

• • • • • • •

[fol. 531]

IN UNITED STATES COURT OF APPEALS

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Darr, Senior District Judge.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 9, 1962

This cause is argued by Avon Williams and Jack Greenberg for plaintiffs-appellants and by Harlan Dodson and Shelton Luton for defendants-appellees and is submitted to the court.

[fol. 532]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—April 4, 1962

Appeal from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel,

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Lester L. Cecil, United States Circuit Judge.

[fol. 533]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14607

HENRY C. MAXWELL, JR., ET AL., Plaintiffs-Appellants,

v.

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENN., ET AL., Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

OPINION—April 4, 1962

Before: Miller, Chief Judge, Cecil, Circuit Judge, and Darr, Senior District Judge.

Cecil, Circuit Judge. This is an appeal from an order of the United States District Court for the Middle District of Tennessee concerning the desegregation of the public school system of Davidson County, Tennessee. This is the county in which the city of Nashville is located.

The appellants are Negroes and citizens of the United States and Davidson county. The adult plaintiffs are parents or guardians of the infant plaintiffs and reside with them in Davidson county. The infant plaintiffs are school children who have been attending the public schools of Davidson county and who can satisfy all of the requirements for admission to the public schools operated by the defendant County Board of Education. The action was brought in the District Court by the plaintiffs, as a class action for themselves and on behalf of all others similarly situated.

[fol. 534] The appellees are the County Board of Education, sued as a corporate or continuous body or entity, the

individual members thereof, sued in their official capacity and as individuals, and the Superintendent of Schools, sued in his official capacity and as an individual.

The parties will be referred to hereinafter, respectively, as plaintiffs and defendants.

By this appeal three of the named infant plaintiffs seek a reversal of an order of the District Court denying them admission to certain schools heretofore denominated "white" schools. It is conceded that they live nearer to the schools to which they seek admission than they do to the so-called "Negro" schools which they are required to attend. It is also admitted that they were denied admission to these schools by reason of their race or color and that if they had been white children their requests would have been granted. The trial judge denied these plaintiffs admission to the schools to which they requested transfers.

He refused to approve the board's plan for a step-by-step, grade-a-year plan of desegregation, but modified it so as to require four grades to be desegregated as of January 1, 1961. This made the schools in Davidson county, outside of and contiguous with the city of Nashville, operate on a parallel basis with the city. As of now, five grades are desegregated.

The plan as approved included a transfer feature which is the same as the one in the Nashville plan. It provided that some of the valid conditions of transfer would be the following: "a. When a white student would otherwise be required to attend a school previously serving colored students only. b. When a colored student would otherwise be required to attend a school previously serving white students only. c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race."

Two questions are presented on this appeal. One, that the constitutional rights of some of the named plaintiffs are being violated in denying them the privilege of immediate transfer to schools that are nearer their homes than the ones they are required to attend, solely on the ground of race or color. Two, that the transfer feature of the plan violates the Fourteenth Amendment to the Constitution.

[fol. 535] for the reason that it provides for transfers to be made solely on the basis of race or color.

The same questions were decided in our opinion in *Josephine Goss, et al., Appellants* v. *The Board of Education of the City of Knoxville, et al., Appellees*, No. 14425, decided April 3, 1962. ... F. 2d ....

In that case we said, on the first question: "As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan."

On the second question, we said: "We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. . . . A similar transfer plan was approved by this Court in *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924. We adhere to our former ruling with the admonition to the Board that it cannot use this as a means to perpetuate segregation."

Reference is hereby made to the *Knoxville* case for our full discussion on these questions. There is virtually no dispute on the pertinent facts of this case as found by the trial judge. We think the law, as applied by him to these facts, is in accord with the spirit and specific requirements of the pronouncements of the Supreme Court on the subject. *Brown* v. *Board of Education*, 347 U. S. 483; *Brown* v. *Board of Education*, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1. Judge Miller's Findings of Fact and Conclusions of Law are reported at . . . Fed. Supp. . . . .

For the reasons stated herein and in the *Knoxville* opinion, and upon the Findings and Conclusions of Judge Miller, the judgment of the District Court is affirmed.

[fol. 536] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 537]

SUPREME COURT OF THE UNITED STATES

No. 217—October Term, 1962

JOSEPHINE GOSS, et al., Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition which reads as follows:

"Whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (Goss case), and Davidson County, Tennessee (Maxwell case), are deprived of rights under the Fourteenth Amendment by judicial approval of a provision in desegregation plans adopted by their local school boards, which expressly recognises race as a ground for transfer between schools in circumstances where such transfers operate to preserve the pre-existing racially segregated system, and which operate to restrict Negroes living in the zones of all-Negro schools to such schools while permitting white children in such areas to transfer to other schools solely on the basis of race."

And it is further ordered that the duly certified copy of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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No 217

IN THE

Supreme Court of the United States

October Term, 1962

JOSEPHINE GOSS, *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

HENRY C. MAXWELL, JR., *et al.*,

Petitioners,

—v.—

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, *et al.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1962

Josephine Goss, *et al.*,

Petitioners,

—v.—

The Board of Education of the City of Knoxville, Tennessee, *et al.*

Henry C. Maxwell, Jr., *et al.*,

Petitioners,

—v.—

The County Board of Education of Davidson County, Tennessee, *et al.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that writs of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the *Goss* case, on April 3, 1962, and the judgment of that Court entered in the *Maxwell* case on April 4, 1962.

Citation to Opinions Below

1. *Goss* case. The memorandum opinion of the United States District Court for the Eastern District of Tennessee (R. Goss 326a) reported at 186 F. Supp. 559, is printed in

the appendix hereto, *infra* p. 1a. The opinion of the United States Court of Appeals for the Sixth Circuit, printed in the appendix hereto, *infra* p. 26a, is reported in 301 F. 2d 164 (6th Cir. 1962).

2. *Maxwell* case. The first Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Middle District of Tennessee (R. Maxwell 114a), reported at 203 F. Supp. 768, is printed in the appendix hereto, *infra* p. 37a. The second Findings of Fact, Conclusions of Law and Judgment of that court (R. Maxwell 171a) is unreported and is printed in the appendix hereto, *infra* p. 57a. The opinion of the United States Court of Appeals for the Sixth Circuit, printed in the appendix hereto, *infra* p. 63a, is reported in 301 F. 2d 828 (6th Cir. 1962).

Jurisdiction

The judgment of the Court of Appeals in the *Goss* case was entered on April 3, 1962 (R. Goss, unnumbered page preceding opinion; appendix, *infra* p. 35a). The judgment of the Court of Appeals in the *Maxwell* case was entered on April 4, 1962 (R. Maxwell, unnumbered page preceding opinion; appendix, *infra* p. 67a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

I.

Whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (*Goss* case), and Davidson County, Tennessee (*Maxwell* case), are deprived of rights under the Fourteenth Amendment by judicial approval of a provision in desegregation plans adopted by their local school boards,

which expressly recognizes race as a ground for transfer between schools in circumstances where such transfers operate to preserve the pre-existing racially segregated system, and which operate to restrict Negroes living in the zones of all-Negro schools to such schools while permitting white children in such areas to transfer to other schools solely on the basis of race.

II.

Whether the personal constitutional rights of three Negro plaintiffs in the *Maxwell* case were violated, where the courts below approved a desegregation plan for the school system which does not provide any nonsegregated education for these pupils at any time, and the courts refused to order their admission at all-white schools from which they had been excluded because of race, even though the school authorities made no showing of relevant administrative obstacles to their admission.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

These two cases involve the desegregation of the public schools of the City of Knoxville, Tennessee, and of Davidson County, Tennessee, an area adjacent to the City of Nashville. This single petition for two cases is filed under this Court's Rule 23(5) as the cases present an identical issue, e.g., the validity of identical provisions in desegregation plans adopted by the two school boards and approved by the courts below. The *Maxwell* or *Davidson County* case presents an additional issue relating to the denial of individual injunctive relief to certain of the Negro plaintiffs.

Both cases were brought by Negro public school pupils and their parents as class actions under Rule 23(a)(3), F. R. C. P., against the local school authorities seeking injunctive and declaratory relief to obtain desegregation in accordance with *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294.[1] In each case, jurisdiction of the District Court was invoked pursuant to 28 U. S. C., §§1331, 1343, 2201 and 2202, and 42 U. S. C., §§1981 and 1983, the cases involving alleged denials of rights under the Fourteenth Amendment. In both cases the school authorities acknowledged by their answers that they were continuing to operate racially segregated public school systems. After directions from the trial courts to present desegregation plans (R. Goss 36a; R. Maxwell 62a), both boards adopted plans to desegregate one school grade each year over a twelve year period, beginning with the first grade, in 1960 in Knoxville and in 1961 in Davidson County. (For text of plans see: R. Goss 38a; Maxwell 39a.) While there were differences in wording, the two plans were substantially the same. Both contained provisions for rezoning of schools without reference to race, and for a system of transfers.

The transfer rule, which is at issue on this petition, provided that pupils could obtain transfers from the schools in their zones of residence to other schools upon request in certain cases. The Knoxville plan provided:

> 6. The following will be regarded as some of the valid conditions to support requests for transfer:
>
> a. When a white student would otherwise be required to attend a school previously serving colored students only;

[1] The *Goss* case was filed December 11, 1959 in the District Court for the Eastern District of Tennessee (R. Goss 5a). *Maxwell* was filed September 19, 1960 in the Middle District of Tennessee (R. Maxwell 7a).

b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race (R. Goss 40a).

The transfer provision adopted by Davidson County was the same except for one or two words not affecting the meaning (R. Maxwell 70a).

Plaintiffs filed written objections to both plans including specific objections to the above-quoted transfer rule (R. Goss 41a-43a; R. Maxwell 72a-76a). The District Courts in both cases held hearings to consider the adequacy of the plans at which the parties presented evidence.

In the *Goss* case, the District Court found the plan acceptable and approved it in all respects, except that it required the school board to re-study and re-submit a plan relating to an all-white vocational school offering technical courses not available to Negro students. On plaintiffs' appeal to the Sixth Circuit in the *Goss* case, the Court of Appeals modified this judgment "insofar as it approved the board's plan for continued segregation of all grades not reached by its grade a year plan," and remanded, instructing the District Court "to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation" (301 F. 2d at 169). Thus, the Court sustained one of plaintiffs' arguments saying the "evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision" (301 F. 2d at 167). The court affirmed the approval of the plan as to the other features, including the transfer provision, stating that this

approval was "subject to it being used for proper school administrative purposes and not for perpetuation of segregation" (301 F. 2d at 168). Plaintiffs' requests for individual injunctive relief requiring their admission in certain white schools were disposed of by the statement that the request was moot as to some pupils who had graduated from school, and that after the school board complied with the Court of Appeals' order to accelerate desegregation, this question might become moot as to the others (301 F. 2d at 168). As indicated above, petitioners in the *Gass* case seek review of the Sixth Circuit's decision only as to its approval of the racial transfer plan.

In the *Maxwell* case the District Court disapproved the school board's twelve year plan and modified it to require that the *first four grades* be desegregated as of January 1, 1961, with an additional grade to be desegregated each September thereafter until all grades were covered. The District Court approved the racial transfer provision and also refused injunctive relief to several plaintiffs who sought admission to white schools nearer their homes as exceptions to the plan in higher grades that were still segregated. On plaintiffs' appeal involving these last mentioned two issues, the Sixth Circuit affirmed the approval of the transfer plan and the denial of injunctive relief as to three plaintiffs who sought individual admissions. Petitioners seek review here of both issues decided by the Court of Appeals in the *Maxwell* case.

Evidence and Holdings:

***Goss* Case**

The major part of the testimony in the record relates to the issue presented by the request for a twelve year delay in desegregation, and since no review of the Sixth Circuit's action on this matter is sought, this factual summary is limited to matters bearing on the transfer plan. The evidence touching on the transfer plan consisted of testimony by school board members as to its meaning, their understanding of its likely effect, and the reasons for the plan. There was also testimony by a school administrator as to prior transfer procedures, and several affidavits and exhibits were filed by plaintiffs in support of their motion for new trial which reflect school board action establishing transfer procedures after the trial court's approval of the plan.

The school board president, Dr. Burkhart, testified that the provision for transfers based on race was adopted out of concern for "the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstance which might be harmful" (R. Goss 108a); that the board thought it might be "harmful" to a certain number of white students to go to school with Negroes and also "it might be harmful to some of the colored students to go with white students if they did not want to" (R. Goss 108a). He said the basis for this feeling was:

> The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways, and certainly not in school ways. And

there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either one of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur (R. Goss 108a).

The witness stated that he did not necessarily refer to physical harm but was more concerned with "mental harm" (R. Goss 109a). With regard to the expected operation of the transfer rule, the school board president testified that he did not know the mechanics as to how pupils would be notified of their new school zones (R. Goss 115a). He further testified:

Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively? A. We doubt that they will.

Q. As a matter of fact, none have remained in the City of Nashville, have they? A. I don't know. All I can do to keep up with the City of Knoxville.

Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not? A. Yes, sir.

Q. And if he applied for transfer out of his zone to a school which had been formerly serving white students only, then his application would be denied under this plan, would it not, sir? A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.

* * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of this plan? A. Yes, sir (R. Goss 118a).

Another board member, Dr. Moffett, acknowledged that the transfer provisions "at least give the opportunity" to perpetuate segregation insofar as they are availed of by the students or parents (R. Goss 205a).

Mr. Marable, a school administrator in charge of handling transfer requests, stated that under the system used before this plan was approved, when parents request transfers he investigates the requests and gets the views of the principals concerned and determines if the family has a "valid reason" (R. Goss 264a-265a); that the school board "leaves that up to me," (*Ibid.*); that he did not know what the board's written rules on transfer provided (*Ibid.*); that "I just know I have handled it so many years on my own, and so far I haven't stuck my neck out on it" (R. Goss 266a); "that each case is individual. That has to be handled that way. Could not have a rule" (266a); that an example of a "valid" reason would be where a child's mother taught at a school and wanted the child with her because she had nowhere to leave it and the school had room and the principal agreed (R. Goss 267a); that generally transfers were granted for "hardship cases and convenience" (R. Goss 267a).

After the trial court approved the plan, the school board adopted a resolution providing for administration of the provisions as follows: "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended" (R. Goss 350, 352a).

The District Court opinion did not discuss the transfer plan issue in its memorandum opinion, although during the trial the court indicated that it regarded itself as bound by the Sixth Circuit's prior approval of an almost identical provision in the Nashville, Tennessee school case (R. Goss 119a). See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209, 228 (6th Cir. 1959).

The Court of Appeals' holding with respect to the transfer plan in the *Goss* case was as follows:

> The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in Kelley v. Board of Education of City of Nashville, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924, 80 S. Ct. 293, 4 L. Ed. 2d 240. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In Boson v. Rippy, supra, the court said, 285 F. 2d at p. 46, the transfer feature "should be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The

trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands (301 F. 2d 164, 168).

***Maxwell* Case**

With regard to the transfer plan, the Superintendent of Schools agreed that the effect of the rule is to permit a child or his parents "to choose segregation outside his zone but not to choose integration outside of his zone" (R. Maxwell 91a); that the provision was identical to that in the Nashville plan; and that as it operated in Nashville and was intended to operate in Davidson County, white pupils were not actually required to first go to the Negro schools in their zones and then seek transfers out, and no Negro pupils who did not affirmatively seek a transfer to an integrated school were assigned to one (R. Maxwell 91a-92a).

Dr. Eugene Weinstein, a professor at Vanderbilt University in Nashville, testified about a survey of the attitudes of Negro parents in Nashville who had a choice of whether to send their children to desegregated schools. He indicated that the most frequent factor influencing those who did not send their children to white schools was an unwillingness to separate several children in a family where they had older children not eligible for desegregation under the grade a year plan. He said the experience in Nashville indicated "mass paper transfers of Whites back into what is historically the White school, of Negroes remaining in what is historically the Negro school"; and that the transfer provisions tend to keep the system oriented toward a segregated system with token desegregation (R. Maxwell 101a-102a).

Six of the plaintiffs in this case reside nearer to all-Negro schools than to white schools (R. Maxwell, 116a-Finding No. 5).

At a further hearing held on plaintiffs' motions following the initial approval of the plan with modifications, the evidence indicated that under the new zones adopted under the plan, in the first four grades, there were 288 white children in the Negro school zones and 405 Negro children in the zones of the white schools (R. Maxwell 150a). The school authorities sent notices to the parents of these children asking them to indicate within three days whether they requested permission for the children to stay at the school presently attended or requested permission for a "transfer" to the newly zoned school (R. Maxwell 142a-145a). Of this group, only fifty-one pupils, all of them Negroes, asked to attend the school in the new zones (R. Maxwell 165a).

As previously indicated the District Court approved the transfer feature of the plan (R. Maxwell 131a-132a). On appeal the Sixth Circuit also approved this provision on the authority of its decision in *Goss* (301 F. 2d at 829).

Three of the Negro plaintiffs (Henry C. Maxwell, Jr., Benjamin G. Maxwell and Deborah Ruth Clark) pressed their claims for individual injunctive relief in both courts below. In the trial court they sought this relief by motion for preliminary injunction, at the trial and by post trial motions for new trial and other appropriate relief. Relief was denied on each occasion.

The trial court found on undisputed evidence that these children (among others) had applied to certain white schools for the September 1960 term, that they were refused admission solely on account of their race or color and that if they had been white children they would have been admitted to the white schools to which they applied (R. Maxwell 115a-116a, Finding No. 4). The Superintendent indicated that admission of these pupils who sought individual relief (there were six originally) would not have caused any great administrative problems (R. Maxwell 53a),

and that: "I wouldn't say there wouldn't be any administrative problem. If we had our children and teachers ready to accept them, maybe there wouldn't be too much of a problem" (R. Maxwell 54a). When asked what administrative problems their admission would create, the Superintendent mentioned only "friction" and the possibility of "bloodshed" or "fights" (R. Maxwell 54a, 56a-60a), based upon his reading of what occurred in Little Rock (R. Maxwell 57a, 93a-94a). He stated that these children could be accommodated "as far as room is concerned" but that he couldn't accept them without accepting all who might apply (R. Maxwell 82a).

The Court denied plaintiffs' request that they be admitted as exceptions to the plan stating in its second opinion dated January 24, 1961 (R. Maxwell 173a):

> With respect to the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr. and Benjamin Grover Maxwell, to be admitted to schools as exception to said desegregation plan, the Court is of the opinion that to grant such exceptions would be in effect to invite the destruction of the very plan which the Court has held is for the best interest of the school system of Davidson County. It is not a plan which is designed to deny the constitutional rights of anyone. It is a plan which is designed to effect an orderly, harmonious, and effective transition from a racially segregated system to a racially non-segregated system of schools, taking into account the conditions existing in this particular locality. And the Court cannot see how these individual plaintiffs who brought this action are or would be entitled to any different treatment from any other children who attend the schools of Davidson County and are members of the class represented by the plaintiffs.

See also the opinion of November 23, 1960 (R. Maxwell 131a).

The Court of Appeals affirmed stating at 301 F. 2d 829:

> The same questions were decided in our opinion in Goss et al. v. Board of Education of City of Knoxville, et al., 6 Cir., 1962, 301 F. 2d 164.
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> In that case we said, on the first question: "As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan."

In *Goss, supra* at 301 F. 2d 168, the Court had gone on to state:

> We think Judge Taylor was correct in denying injunctive relief and as he so eloquently said: "Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there."

REASONS FOR GRANTING THE WRITS

I

With regard to the racial transfer plan, there is a conflict among the circuits, the decisions below are in conflict with principles established by this Court, and the issue is of widespread importance.

There is a clear and direct conflict between the opinion of the Court of Appeals for the Fifth Circuit in *Boson* v. *Rippy*, 285 F. 2d 43 (5th Cir. 1960) and the opinions of the Sixth Circuit in the *Goss* and *Maxwell* cases as well as that court's opinion in *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (6th Cir. 1959), cert. den. 361 U. S. 924. In the *Boson* case the Fifth Circuit held that an identical transfer provision was unconstitutional, and expressly recognized that its holding was in conflict with the *Kelley* case, *supra*, stating:

> We fully recognize the practicality of the argument contained in the opinion of the Sixth Circuit holding that similar provisions are not unconstitutional.
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> Nevertheless with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school (285 F. 2d at 48).

The Fifth Circuit went on to say that "the transfer feature should be stricken because its provisions recognize race as an absolute ground for transfer of students, and its application might tend to perpetuate racial discrimination" (*Ibid.* at 47). In the *Goss* opinion 301 F. 2d at 168), the

court, after emphasizing the word "might" in the last quoted passage, went on to mention the fact that the transfer provision functions only on request and rests with the students or parents, and said that the matter might be safely left in the hands of the trial judge. Petitioners submit that this is no distinction at all between the *Goss* case and *Boson* v. *Rippy, supra,* for in *Boson* also the transfer provision functioned only at parents' request and the court was required to retain jurisdiction. The Sixth Circuit's qualification of its approval of the plan affords no ascertainable safeguards. The Court states that its approval is "subject to its being used for proper school administrative purposes and not for perpetuation of segregation." But the court did not indicate how racial transfers might be used for proper administrative purposes, or how the plan could operate other than to perpetuate segregation. Perhaps this puzzling reference is to the perpetuation of *complete* racial segregation in the entire school system. In any event it is self evident that to the extent that the transfer rule is availed of by parents it will work to preserve the pre-existing pattern of segregation. Obviously transfers of white children from Negro to white schools, and of Negro children from white to Negro schools, will have this effect. It is equally clear that the plan does not provide for transfers on the basis of race to promote desegregation.

Similarly the Sixth Circuit's comparison of this provision with pupil assignment laws which are "not inherently unconstitutional" but may be applied so as to "become a violation of constitutional rights" is not apt. The pupil assignment laws upheld in such cases as *Shuttlesworth* v. *Birmingham Board of Education,* 162 F. Supp. 372 (N. D. Ala. 1958), affirmed on limited grounds, 358 U. S. 101; *Dove* v. *Parham,* 271 F. 2d 132 (8th Cir. 1959), and *Carson* v. *Warlick,* 238 F. 2d 724 (4th Cir. 1956), conspicuously did *not* mention race as a basis for determining transfers.

When race has been found to be a consideration affecting transfers in the pupil assignment law cases, the appellate courts have uniformly held the pupil assignment laws to be invalidly applied. See for example: *Norwood* v. *Tucker*, 287 F. 2d 798 (8th Cir. 1961); *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Green* v. *School Board of the City of Roanoke, Va.*, —— F. 2d —— (4th Cir. No. 8534, May 22, 1962); *Marsh* v. *County School Board of Roanoke County, Va.*, —— F. 2d —— (4th Cir. No. 8535, June 12, 1962); *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72 (4th Cir. 1960). The pupil assignment cases support the view that the racial transfer is invalid, since the only manner in which the rule can be invoked is on the basis of race.

The Sixth Circuit's holding then furnishes no safeguards, or real limitations on use of the transfer rule. There is no indication that the Court regarded the rule as an interim or temporary transitional device to be discarded at a later date, nor is there any indication that the trial court so viewed it. Thus retention of jurisdiction has no particular significance on this point.

While the court below discussed plaintiffs' argument that the rule would perpetuate segregation in the Negro schools, there is no discussion of plaintiffs' argument that the rule discriminates against Negro pupils living near the Negro schools. This discrimination is very plain and simple. A Negro child living in the zone of an all-Negro school must go to that school; his white neighbors are permitted to transfer out of the zone and attend an all-white or predominantly white school. This valued privilege to transfer out of a school zone is thus conferred or denied solely on the basis of the race of the pupil. This is exactly the type of racially discriminatory application of transfer rules condemned in each of the pupil assignment law cases cited above.

It is interesting to compare this device with that revealed in *Taylor* v. *Board of Education of City of New Rochelle*, 191 F. Supp. 181, 185; 195 F. Supp. 231 (S. D. N. Y. 1961), app. dismissed 288 F. 2d 600, affirmed 294 F. 2d 36 (2nd Cir. 1961), cert. den. 368 U. S. 940, where the courts went even a step beyond condemning a practice similar to that here. In *Taylor* the school officials had at one time followed a rule allowing white children to transfer out of a Negro school zone, but abandoned this practice before the suit was brought. The Court held that the school board was nevertheless still obligated to relieve the segregated situation which continued because of this prior practice and a prior gerrymandering of zone lines. *A fortiori* from the *Taylor* decision, a present practice of allowing white pupils to transfer out of a Negro school zone on the basis of race is unlawful.

However, here the defendants point to the correlative provision of the plan which effects a similar disparity in treatment on a racial basis in white school zones as justifying that in the Negro zones. They argue that since a white child in a white area cannot transfer, but a Negro there can transfer to a Negro school, the reciprocal discriminations "balance out" as it were. But this symmetrical inequality of treatment on a racial basis ignores the personal nature of the Fourteenth Amendment rights to racially nondiscriminatory treatment by school officials. The Negro pupil denied a transfer granted to his white neighbors is no less aggrieved by this because in other areas of the city white pupils are denied options given to Negroes, particularly where this denied "privilege" (to attend the all-Negro school) is one that few white persons in the community desire in any event.

The problem is very much like that dealt with in *Shelley* v. *Kraemer*, 334 U. S. 1, where it was argued that a racial

restrictive covenant enforced against Negroes was valid, since the courts would enforce similar covenants against white persons. After observing that it knew of no case of such a covenant against white persons, the Court said at 334 U. S. 22:

> But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. [Footnote citing McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151, 161; Missouri ex rel. Gaines v. Canada, 305 U. S. 337; Oyama v. California, 332 U. S. 633.] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

It is submitted that the ruling of the Fifth Circuit in *Boson* v. *Rippy*, 285 F. 2d 43, 47-50 (5th Cir. 1960) is in accord with this Court's determination in *Brown* v. *Board of Education*, 347 U. S. 483 that racial classifications in public education violate the Fourteenth Amendment. Such racial classifications are "not reasonably related to any proper governmental objectives." *Bolling* v. *Sharpe*, 347 U. S. 497, 500.

This transfer plan violates these principles by classifying schools both by reference to the race of the pupils previously attending them, and by reference to the race of the majority of the pupils in each school. It also classifies pupils by race in determining their eligibility to transfer. Such racial classifications are presumptively arbitrary. Cf. *Korematsu* v. *United States*, 323 U. S. 214, 216; *Hirabayashi* v. *United States*, 320 U. S. 81, 100. The defendants

have not offered any theory to justify these racial classifications except that they accommodate those who desire segregation (R. Goss 109a).

It is submitted that this does not satisfy the defendants' obligation under *Brown, supra,* and *Cooper* v. *Aaron,* 358 U. S. 1, 7 "to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system."

The public importance of the issue presented by this racial transfer plan has increased as its use has become widespread. When the issue was first brought to this Court's attention in 1959 in the *Kelley* case, it was a new issue and involved only Nashville, Tennessee. Nevertheless, at that time the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan, indicated that they:

> . . . although cognizant that the District Court retained jurisdiction of the action during the transition, would grant the petition for certiorari limited to the fourth question: whether the provisions of paragraphs four and five of the plan are constitutionally invalid for the reason that they "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination" (361 U. S. 924).

Since *Kelley,* this plan has been adopted in numerous communities, and the courts have expressed divergent views. In addition to *Boson* v. *Rippy, supra,* and the two cases involved here, see *Mapp* v. *Board of Education of City of Chattanooga, Tenn.,* 203 F. Supp. 843 (E. D. Tenn. 1962) which held such a transfer plan *invalid* a few days before *Goss,* saying: "Reason would appear to favor the Boson decision. Not only is the proposed transfer plan of ques-

tionable legality, but it is the opinion of the Court that any transfer plan, the express or primary purpose of which is to prevent or delay the adoption or implementation of the plan of desegregation herein developed, should not be approved. The transfer plan proposed by the Board of Education would at the very least greatly delay the implementation of a plan already gradual in its provisions, if not prevent its ever becoming fully adopted." See also *Jackson* v. *School Board of City of Lynchburg, Va.*, 203 F. Supp. 701, 704-706 (W. D. Va. 1962) (held plan valid; appeal pending); *Thompson* v. *County School Board of Arlington County, Va.*, unreported (E. D. Va. March 1, 1962) (excerpts in 30 U. S. Law Week 2446; held plan valid, refused to retain jurisdiction, vacated injunction; appeal pending). The Court of Appeals for the Fourth Circuit now has this issue under advisement ~~in a~~ case argued June 12, 1962, *Dillard* v. *School Board of City of Charlottesville, Va.*, 4th Cir. No. 8638.

The racial transfer device has thus become a significant and effective method for limiting desegregation. Its use insures that the traditional all-Negro schools will remain all-Negro, even after every grade is covered in a grade-by-grade plan. This has been the uniform experience with this device. The transfer rule is thus a potent device for partially negating this Court's decision in *Brown* v. *Board of Education*.

This Court has reviewed but one school desegregation case, on plenary hearing, since *Brown*, e.g., *Cooper* v. *Aaron*, *supra*, nearly four years ago. In the seven years since the second *Brown* decision school segregation litigation has been extensive. Progress in desegregation has been statistically insignificant in some of the states where there has been the most litigation. The Southern School News reported in May 1962 (Volume 8, No. 11, p. 1) that only 7.6%

of the Negro students in 13 southern states and the District of Columbia were in school with white pupils,[3] that there has been an increase of only 1.6% in the past two years[4] and that the District of Columbia and six border states have the greatest proportion of these desegregated Negro students. It is submitted that a review of this case will enable the Court to scrutinize one of the principal methods being used to preserve segregation against legal attacks.

II.

The decision below in the *Maxwell* case denying injunctive relief to three Negro plaintiffs who sought admission to white schools in grades not reached by the plan is in conflict with principles established by this Court and is of public importance.

Petitioners, Henry C. Maxwell, Jr., Benjamin G. Maxwell and Deborah Ruth Clark, have been admittedly denied admission to schools they otherwise would be entitled to attend under the segregation policy. The courts below recognized that this denial of admission infringed their rights under the Fourteenth Amendment, but denied relief on the ground that exceptions would "destroy" the grade-by-grade plan.

It is submitted that the courts below failed to give adequate recognition to the principle stated by this Court in the second *Brown* decision, where it said:

> At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis (349 U. S. at 300).

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[3] The Tennessee figure was reported at .750%, representing 1,167 students in 17 communities. Southern School News, May 1962, Vol. 8, No. 11, pp. 1, 9.

This Court had, of course, previously emphasized the personal nature of the rights involved. *Sweatt* v. *Painter*, 339 U. S. 629, 635; *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633; *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

In terms of all of the factors mentioned by the second *Brown* decision, the admission of these plaintiffs was plainly shown to be practicable when their request was made. The Superintendent of Schools justified their exclusion only in terms of apprehended "friction" and "bloodshed" arising out of opposition to desegregation. These factors are plainly legally irrelevant in even supporting delay of plaintiffs' rights, and certainly cannot justify abandoning them altogether. *Brown* v. *Board of Education*, 349 U. S. 294, 300; *Cooper* v. *Aaron*, 358 U. S. 1, 7, 16; *Buchanan* v. *Warley*, 245 U. S. 60, 81.

The statement by the Court of Appeals that a multiplicity of individual suits for such admissions could thwart the smooth working of the plan (301 F. 2d at 829) rests the decision of the case before the court on problems which might arise out of a possibility which has not yet occurred and might never occur. Here only three persons seek exceptions to the plan. If larger numbers sought similar privileges, a different administrative problem might be presented and could be dealt with accordingly. There was room for the plaintiffs in the schools they sought to attend. The fact that later applicants might present an overcrowding problem should not bar these applicants. The Fourth Circuit recently rejected such a contention in *Marsh* v. *County School Board of Roanoke County, Va.*, —— F. 2d —— (4th Cir. June 12, 1962), saying "the fear that applications which have not yet materialized might create a serious crowding problem is no reason for rejecting applicants before the problem has arisen."

The Third Circuit in *Evans* v. *Ennis*, 281 F. 2d 385, 393 (3rd Cir. 1960), rejected a grade-a-year plan, stating as one of its reasons the fact that the plaintiffs were deprived "of any chance whatever of integrated education." *Evans* v. *Ennis, supra*, required that pupils who actually sought desegregation be granted relief, though it permitted complete elimination of the dual system to proceed over a longer period. Similarly the Fourth Circuit has approved decisions granting individual litigants relief as exceptions to general desegregation programs in *Board of Education* v. *Groves*, 261 F. 2d 527, 529 (4th Cir. 1958); *Moore* v. *Board of Education*, 252 F. 2d 291 (4th Cir. 1958). See also *Pettit* v. *Board of Education*, 184 F. Supp. 452 (D. Md. 1960); and cf. *Jackson* v. *School Board of City of Lynchburg, Va.*, 201 F. Supp. 620 (W. D. Va. 1961). *Cf.* also the concurring opinion by Justice (then Judge) Stewart in *Clemons* v. *Board of Education*, 228 F. 2d 853, 859-860 (6th Cir. 1956).

The importance of a nonsegregated education to these plaintiffs is indeed reemphasized by a finding in the record that on an overall basis Negro children who have not attended desegregated schools have achievement levels substantially below white children and that this disparity in Davidson County "increases in direct proportion to the grade of the child" (R. Maxwell 126a-127a). The trial court regarded this as support for a gradual desegregation program. However, it obviously demonstrates that the longer Negro pupils are kept in segregated schools, the more their disadvantaged situation is aggravated.

The trial court's suggestion (173a) that it would be discrimination in favor of the plaintiffs if they were granted exceptions is extremely ironic, since the question involved is whether a court of the United States shall enforce personal constitutional rights to the equal protection of the

laws. The enforcement of the rights of those who come to court to secure them is traditional in our system of law. The theory adopted by the Sixth Circuit which relegates plaintiffs to a vicarious enjoyment of constitutional rights, is the innovation. It is not the "accident of fate," but the action of the school board, which denies plaintiffs' rights.

The trial court's retention of jurisdiction does not presage any possibility that exceptions might be considered in the future, despite the puzzling statement that plaintiffs' rights were merely "postponed." The Court of Appeals made clear that it considered their rights to have been properly "subordinated for the good of many" (301 F. 2d at 829).

This case represents a serious departure from the doctrine of the *Brown* case that individual plaintiffs' rights must be enforced "as soon as practicable." Here there were no circumstances which might even justify delay in enforcement as to these plaintiffs. Thus the case presents a publicly important issue, touching as it does, the enforcement of basic constitutional rights.

CONCLUSION

WHEREFORE, petitioners respectfully pray that the writs of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinions and Judgments in *Goss* Case

District Court Memorandum Opinion

Filed: August 19, 1960

This suit was filed by a number of negro children and their parents or guardians against the Members of the Board of Education of the City of Knoxville, namely, John H. Burkhart, Robert B. Ray, Roy E. Linville, Charles R. Moffett and Mrs. Gilmer H. Keith, and also the Board of Education of the City of Knoxville, the School Superintendent and the persons who were either actual principals or acting principals of East High School, Park Junior High School, Mountain View Elementary School and Fulton High School in Knoxville, Tennessee, the Supervisor of Child Personnel Department, said defendants being the administrative officers having general supervision and control of the public schools of Knoxville, asking for an injunction restraining defendants from operating a compulsory racially segregated school system in Knoxville and for a declaratory judgment, declaring the rights of plaintiff school children to be admitted to the public schools of Knoxville on a racially unsegregated basis and without discrimination on account of race or color.

The defendants by answer admitted that the public schools were operated on a segregated basis, as had been the practice and custom in the Knoxville area since 1870.

The answer asserted that "Two duties of these defendants, have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a careful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged

the responsibilities of their offices in the only way that a proper reconciliation of conflicting allegiances has permitted . . ."

In short, the position of the Members of the School Board was that the interest of the community demanded postponement of desegregation until a plan could be perfected that would fit the needs of the community.

The suit arises under the Constitution of the United States and seeks the enforcement of rights guaranteed by the Fourteenth Amendment. Jurisdiction is derived from Title 28 U. S. C., Sec. 1343. The Court has jurisdiction of the parties and the subject matter. Title 28 U. S. C. 1331, 2201, 2202.

The action was filed as a class action under Rule 23(a) (3) of the Federal Rules of Civil Procedure.

The parties stipulated many facts, many of which are included below in this memorandum opinion.

Plaintiffs are negroes and are citizens of the United States, State of Tennessee and are residents of and domiciled in the City of Knoxville, Knox County, Eastern Division of Tennessee. Adult plaintiffs, not applicants, are either parents or guardians of the infant plaintiffs who are applicants.

All infant plaintiffs are attending public schools operated by the City of Knoxville, except that infant plaintiffs, Blake, Robinson, Jr., Riddle and Thompson, graduated from Austin High School on May 31, 1960.

Defendant, Board of Education, operates the public elementary and secondary schools, including those now designated as Mountain View Elementary, Park Junior High, East High and Fulton High Schools, exclusively for the education and use of white children residing in the City of Knoxville. These schools are attended exclusively by white children and admittance thereto was denied to the

infant plaintiffs and other negro children similarly situated who reside in the areas proximately surrounding said schools, solely because of their race or color. The defendant, Board of Education, maintains and enforces a policy and practice of compulsory racial segregation throughout the Knoxville School System.

Fulton High School, in addition to providing the usual high school courses, affords adequate facilities to provide technical and vocational instruction on a modern basis by grades. It is used by white children residing in the City of Knoxville, Tennessee who desire and are qualified to take said technical and vocational instruction, irrespective of their place of residence in the City of Knoxville; but the facilities afforded by Fulton High School are denied by defendants to infant plaintiffs who desire instruction, and other negro children similarly situated, residing in the City of Knoxville, irrespective of their place of residence in the City of Knoxville, solely on account of their race or color.

The School System of Knoxville consists of 40 schools, total enrollment of 22,448 students, of whom 4,786 are negro students and 17,662 are white students, as at the close of school June, 1960. On that day, the Knoxville School System employed a total of 879 principals and teachers, 712 of whom are white persons and 167 are negroes.

The enrollment in the first grade of the Knoxville Public School System was approximately 2,314 students, and 2,500 are anticipated in the first grade for the year beginning 1960, of whom approximately 1,900 are anticipated to be white students and 600 negro students. Teachers employed for the first grade, year 1959-1960 of the Knoxville School System numbered 84, of whom 63 were white persons and 21 were negroes.

Insofar as quality of teaching is concerned, the Public Schools of Knoxville operated for negro students are substantially equal to the Public Schools of Knoxville operated for white students.

There is no difference in the salary schedules of negro teachers and white teachers.

The physical facilities for white and negro students are excellent.

Beginning with the year 1954 and continuing from time to time to the filing of the present suit, negro parents and children and other citizens have petitioned the School Board and appeared before the School Board and asked the Board to take immediate action towards desegregation of the Public School System.

On June 16, 1955, the Attorney General of Tennessee rendered an opinion to the State Commissioner of Education, and through him to the Superintendent of Education for the State of Tennessee, in which he stated in substance that under the Tennessee Code it is the responsibility of each local school board to determine for itself the way in which it will meet the problems of desegregating the schools under its jurisdiction. As a result of this opinion, together with the decision of the United States Supreme Court in the *Brown* Case, the Board in a special meeting held on August 17, 1955 resolved that it would act in good faith to implement the constitutional principles declared in the *Brown* decision as applied to public schools, and would make a prompt and reasonable start towards those objectives.

The Superintendent and his administrative Staff were instructed to develop a specific plan of action leading to the gradual integration of the Knoxville public schools.

District Court Memorandum Opinion

At a special meeting held on August 17, 1955, following the second *Brown* decision of May 31, 1955, the Board reaffirmed its policy to work towards gradual desegregation.

Two Members of the Board and two Members of the supervisory Staff visited the integrated public schools of Evansville, Indiana in July, 1955 to study desegregation in those schools.

On August 17, 1955 the Board directed the Superintendent and his Staff to develop a plan of action leading to the gradual integration of the public schools and to that end the Superintendent and his Staff began holding meetings for the purpose of further exploring the subject. As an outgrowth of these meetings, the study council, composed of all principals, school administrators and supervisors (both white and negro) and the Superintendent of Schools, was formed for the purpose of exploring and studying plans and procedures in school desegregation. This study council held an additional series of meetings and formulated several possible plans for desegregation, eight of which were presented to the Board for the Board's study. These study groups continued with their meetings the remainder of 1955 and during the year 1956.

In the meeting of May 11, 1956, the Board announced that each of the eight plans for desegregation had been carefully reviewed by the Board but that the Board did not feel at that time that desegregation of the Knoxville public schools could be successfully put into operation. Three reasons were given for such action:

(a) Segregation should not be attempted until the school building program is further advanced.

(b) The Members of the Board do not believe that the people of both races are ready for a definite plan for desegregation and that further delay would lessen the likeli-

hood of unpleasant incidents which have occurred in some places where desegregation has been inaugurated.

(c) Before any plan for desegregation is put into effect, further studies should be made of the subject, and plans further developed that the children of both races will not be handicapped by a radical change in their classroom life.

During the week of August 27, 1956, serious trouble developed in Anderson County, Tennessee in the integration of the Clinton High School. This trouble produced several tense hearings and trials in this Court. In September, 1957, a Nashville, Tennessee elementary school was bombed and severely damaged. On October 5, 1958, Clinton High School in Clinton, Tennessee was bombed causing damage estimated at $250,000.00 to $300,000.00.

A hearing was held by this Court on February 8, 1960 on plaintiffs' motion for a preliminary injunction prohibiting the defendants from refusing to admit or transfer the infant plaintiffs to the schools to which they had applied for admittance on account of their race or color and for the declaratory relief sought in the complaint. At this hearing, defendant, Board of Education, agreed that it would submit a plan for desegregation on or before April 8, 1960. Action on other phases of the relief sought in the complaint was postponed, pending the submission of the plan.

On April 8, 1960, the Board filed the following Plan, which is sometimes referred to as Plan Nine:

"1. Effective with the beginning of the 1960-61 school year racial segregation in Grade One of the Knoxville Public Schools is discontinued.

2. Effective for 1961-62 school year racial segregation shall be discontinued in Grade Two and thereafter

in the next higher Grade at the beginning of each successive school year until the Desegregation Plan is effected in all twelve grades.

3. Each student entering a desegregated grade in the Knoxville Public Schools will be permitted to attend the school designated for the Zone in which he or she legally resides, subject to regulations that may be necessary in particular instances.

4. A plan of school zoning or districting based upon the location and capacity (size) of school buildings and the latest enrollment studies without reference to race will be established for the administration of the first grade and other grades as hereafter desegregated.

5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration.

6. The following will be regarded as some of the valid conditions to support requests for transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only;

   b. When a colored student would otherwise be required to attend a school previously serving white students only;

c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

One Board Member voted against the Plan, stating that "what the Board is doing is a mistake."

The Members of the Board are continuously changing, while the Members of the Administrative Staff remain constant. Certain Members of the Board are elected at biennial election and this puts the terms of the Members on a staggered basis.

Plaintiffs filed seven objections to the Plan on April 18, 1960. It is insisted by the plaintiffs in these objections that: (a) The Plan does not provide for elimination of racial segregation "with all deliberate speed" as required by the Fourteenth Amendment to the Constitution; (b) it does not take into account the five years which have elapsed during which the Board has failed and refused to comply with the Fourteenth Amendment; (c) a period of twelve years for the consummation of the Plan is not in the public interest and is not in compliance with the Fourteenth Amendment; (d) the defendants have not carried the burden of proof of showing problems related to public school administration as specified by the Supreme Court in the second decision of *Brown* v. *Board of Education* (May 31, 1955), 349 U. S. 294; (e) under the Plan, the infant plaintiffs and all other children attending the public schools of Knoxville in their class will be deprived of their right to attend a desegregated school as guaranteed to them by the Fourteenth Amendment; (f) the Plan deprives infant plaintiffs and those similarly situated from enrolling in Fulton Technical High School and other special vocational schools, summer

courses and kindred educational training of a specialized nature as to which enrollment is not based upon residence; and (g) Paragraph 6 of the Plan violates the due process clause of the Fourteenth Amendment in that said paragraph provides racial factors as conditions to support requests to transfer, and the racial factors are designed and necessarily operate to perpetuate racial segregation.

A trial was held on August 8-11, 1960 on defendants' motion for the adoption of the Plan and plaintiffs' objections thereto. Substantial testimony was introduced during the trial, a material portion of which consisted of the reading of discovery depositions of various individual defendants and of a number of adult plaintiffs.

The controlling issue in the case and to which the greater part of the evidence was directed is:

Is the time delay provided for in the grade a year desegregation proposal reasonably necessary in the public interest and is it "consistent with good faith compliance at the earliest practicable date"? See *Brown* v. *Board of Education, supra.*

It is the position of the Board that a more accelerated plan for desegregation would cause administrative problems of great magnitude and serious interruption in the operation of the Knoxville School System with resultant deleterious effects upon the school children of both races.

The Board maintains that the grade a year plan is a compliance with the "deliberate speed" concept in the light of the existing conditions in the Knoxville area.

As to the good faith phase of the issue, the Board insists that its Members, the then Superintendent of Schools and the Members of his Staff, began to consider the question of desegregation immediately following the first decision in the *Brown* Case in 1954 but that they withheld efforts to

perfect a plan until the second *Brown* decision on May 31, 1955; that following this decision Board meetings and workshop meetings were held by the Board with principals of negro schools and white schools; and that much of the literature on the subject of desegregation was studied with the view of finding a plan that would meet the needs of the Knoxville community and at the same time protect and enforce the constitutional rights of the negro children attending the public schools of Knoxville.

In support of the Plan, *Superintendent Johnston* testified that he became Superintendent on June 15, 1955 and that on the next day he asked his Administrative Staff to come together to discuss the Supreme Court's decision and steps that ought to be taken to study the best approach to compliance with the decision; that out of the meeting grew the suggestion that some Members of the Staff and of the Board visit a city with experience in desegregation; and that the City of Evansville, Indiana was chosen because of its comparable size and because it had been operating under a desegregated program since 1949. He testified that two Members of the Board and two Members of the Staff visited the schools in that City and spent a day or more in the schools and with the superintendent.

Subsequently, on July 25, 1955, he inaugurated a program of inviting white principals, Members of the Board and Staff to discuss how best to comply with the Supreme Court's decision. He attempted at the meeting to establish an atmosphere or environment under which these persons would talk freely on the subject.

A week later, they had a similar meeting with the negro principals, Members of the Board and Staff at which exactly the same matters were discussed in an atmosphere under which the negro principals would feel free to ask questions and make suggestions.

He testified that separate meetings were held at his own suggestion with the thought that participants would talk more freely if they met separately and that thereby he could better assess whether there was opposition or a good feeling about the whole business.

At the same time, he inaugurated a series of Staff meetings for a period of an hour a day for 15 successive working days for the exchange of views on the problem.

On January 26, 1956, he testified that they convened a meeting of the negro principals and general supervisors in the central office to determine whether they were willing to participate in a series of meetings to consider the subject of desegregation. A similar meeting with the white principals came a few days afterwards.

On February 1, 1956, a Staff meeting was held to survey the willingness of principals of both groups to join in a study group or workshop. On February 2, 1956, all principals regardless of race were called for a meeting in the central office at which no shyness or reticence to discuss the subject appeared. He commented that for 32 years to his personal knowledge negro principals and white principals had met together in regular meetings.

He testified that a series of workshop meetings were developed to explore different plans and that out of these meetings there evolved eight suggestions to be submitted to the Board of Education without recommendation which were the result of the studies of the principals of both races and of the Staff.

Subsequently, in January, 1957 at a meeting, he requested the principals of both races and the supervisors to meet with him to further discuss the subject. At that meeting he indicated that he would like personally to come to the schools and sit down with their faculties and talk with the

teachers to see how they felt on the subject because he felt that "the burden of making that plan successful . . . would be on the shoulders of the teachers who work closely with children and with parents." Following this meeting, he testified that he started going to schools at the invitation of the principals and that he attended 12 to 15 such faculty meetings. It was his purpose to discover through these informal meetings whether there were members of the faculties who opposed any form of desegregation. He wanted to determine whether there were pockets of resistance or whether a favorable climate for compliance existed among the teachers. These meetings continued through the school year 1957. By Fall, he testified, the invitations seemed to slow down and that he seemed to detect a feeling amongst the negro and white principals which did not exist before. He pointed out that there had been dynamiting and other difficulties around the Knoxville area; and that trouble had arisen in Nashville and Clinton.

Superintendent Johnston stated that violence occasioned by desegregation in neighboring cities caused us to reflect a little more on how it will affect us and made us more conscious of what might happen here. He pointed out that no child could get an education operating under a feeling of fear or tension or emotional unrest and that every day a child loses from its normal educational program is practically gone forever and will never be completely regained; that order is the first law in the classroom and that an educational program must have order if children were going to learn. He said: "We were concerned with that."

At the same time, he noted that the School Board was engaged in an extensive building program which involved both Staff and Board and which was heavily time consuming; that Board and Staff Members examined blue-

prints and drawings of the architects minutely and that they made innumerable visits to the buildings when they were under construction and that before a building was accepted it was the duty of the Board to go through it, inspect the rooms, corridors and facilities in the company of the architect and of the representative of the contractor.

This was a massive building program carried out under Bond Referendums of 1946 and 1954 and involved nearly eight million dollars of new construction and remodeling in both white and colored schools.

In implementation of the Plan filed on April 8, 1960, the Superintendent testified that he instructed his Staff to begin work on a zoning map which was approved at a meeting of the Board on August 6, 1960, just two days before the hearings began. He testified that he instructed his Staff that in the preparation of the map there would be no maneuvering or gerrymandering, that the re-zoning and re-establishing of school zones must be based on enrollment studies and on the size and capacity of the buildings. The work was in charge of Mr. Frank Marable, Supervisor of Child Personnel, whose duty it is to check on attendance, school zones and the movement of people.

On cross-examination, he testified that in preparing the map, efforts were made through the pre-school round-up program and estimates of principals to get estimates of the number of children that would be affected. This zoning plan was confined to the elementary schools and did not include the secondary schools.

Under detailed cross-examination, Mr. Johnston pointed out that small groups or pockets of negro homes were scattered throughout the Knoxville City School System in contrast to major concentrations of negro citizens; that the zone boundaries were often dictated by artificial barriers

like heavily traveled streets and also by the size and capacities of school buildings.

In response to a question that some capacity was preserved at Park Lowry for transfers which were authorized under the Plan, he testified that he had no way of knowing who was going to ask for a transfer and that he only knew that under the Plan white students and negro students would be treated alike.

He testified categorically that no member of his Staff in working on the map had ever operated deliberately to cut out negro children; and that they tried to work the thing out on a fair basis, depending on the size of the building, shifting population and enrollment.

With reference to the fact that eight plans were originally developed for submission to the Board and that the Plan which was finally adopted involved only a grade a year desegregation, he testified that the Plan adopted was based on the experience around us and studies of the general situation of desegregation; that it was felt that this plan could be introduced in the City of Knoxville with the least disturbance to the over-all educational program; and that it would be accepted by the majority of citizens with less tension and less emotional excitement than any other plans that had been studied.

He reiterated that the Knoxville School System had been in existence since 1870 and that desegregation would not be easy; that it was the goal to achieve desegregation and at the same time maintain an orderly decorum or environment under which all children could continue to go to school day by day free from tension and free from fear. He repeated that order is the first rule of a classroom.

In presenting the grade a year plan to the Board, the Staff made seven observations in favor of the plan. The

first was that it appeared to meet the requirements of the Supreme Court decision and of the laws of the State which placed the burden or responsibility on local boards for desegregation and for the assignment and placement of students. Second, the Plan did not limit the speed with which it could be implemented. Third, it provided for gradual implementation until the complex problems of zoning, transfer and assignments of students could be adjusted in the light of experience. Fourth, it had the advantage of numerous other plans as a background for its adoption. Fifth, the main features of the Plan have been upheld by higher courts. Sixth, the Plan lessened the opportunity for developing prejudices. Seventh, it minimized the possibility of administrative problems that could be of such complexity and magnitude as to seriously undermine and impair the total educational program of the City.

Finally, he emphasized the adaptability of small children and that they do not have the prejudices of older children or grown people and could be fitted into the work easier than older children. He felt that the gradual plan would enable the school system to continue a fine educational program with less tension, less fear and less emotional disturbances than a plan which rushed into a broader field of desegregation. He felt that the gradual plan would have the sympathetic understanding of the great majority of the citizens of the City. He pointed out the importance of this in going before the City Council on behalf of school budgets with which to operate the schools; that the School System had to have the sentiment of the people with it because it involves budgets, their attitude towards referendums for new schools and new buildings, etc.

With reference to evidence that there had already been desegregation of ball parks, public libraries, buses and air-

port restaurants, etc. in and around Knoxville and that this would seem to indicate that a speedier plan of desegregation could be inaugurated. Superintendent Johnston pointed out that under the compulsory attendance law, children are compelled to go to school for a period of seven hours a day and that he knew of no law that compelled them or any adult to go to a ball park, the library or airport restaurants. He pointed out that those were optional matters, but that under the school law children were required to go to school.

In the course of his testimony, Superintendent Johnston testified to certain achievement tests given all children in the sixth grade in the Knoxville schools. His testimony was that as a result of these tests it appeared that the achievement levels of students from white schools were somewhat above the national norm and that the student level from colored schools were substantially below the national norm. This testimony was objected to by the plaintiffs on the ground that the results of the tests were hearsay. The Court recognized this objection, but admitted the testimony for such bearing as it might have on the good faith of the Board in utilizing the grade a year plan.

In his deposition, Superintendent Johnston was asked about the industrial courses given at Austin High School, the colored school, and at Fulton High School, the white technical school. It appeared from his testimony that Fulton High gives a course in television, a course in advanced electronics, ones in air conditioning, refrigeration, commercial art, commercial photography, distributive education, drafting, machine shop, printing and sheet metal which are not offered at Austin High School. Certain courses, he testified, such as brick masonry, tailoring, etc., are offered at Austin which are not offered at Fulton.

Colored students are not admitted to these courses at the present time at Fulton High School because of the segregated schools.

Generally, the testimony of Superintendent Johnston was that the school facilities and teaching level at both the colored and white schools are equal. He pointed out that the colored teachers are paid at the same salary level as those in the white schools and that the work done is equivalent. These facts were also stipulated.

The conclusion the Court draws from this evidence is that students including plaintiffs now in school who would not, if Plan Nine were adopted, be permitted to go to an integrated school, would still have equal opportunities for an education in the fine colored schools with their excellent teaching staffs.

This conclusion is not true of the special technical courses offered at the Fulton High School. Under Plan Nine colored students now in school and desiring those courses would be barred from taking those courses. They would have to complete their scholastic education without the opportunity of taking these courses. Superintendent Johnston testified that he had talked to the teachers in the Fulton High School and they were of the opinion that to admit colored students to these courses would cause trouble and disciplinary problems, an opinion in which he joined.

Nevertheless, the Court feels that despite the great merit of Plan Nine, it is deficient in that it precludes colored students now in school from ever participating in these specialized courses.

Mr. Burkhart, Chairman of the Board since 1958, was of the opinion that complete desegregation would disrupt the orderly process of education in Knoxville and that the children of both races would be materially affected thereby.

This opinion was based in part on the attitude of the great majority of the citizens of the Knoxville area who feel that the citizenship is not prepared at this time to accept anything except gradual desegregation. He was further of the opinion that complete desegregation would cause violence in the community.

This Court recognizes that the Supreme Court stated in substance in *Cooper v. Aaron*, 358 U. S. 1, that opposition to desegregation was not alone a sufficient reason to postpone desegregation. But, the Court also stated in substance in *Brown v. Board of Education*, 347 U. S. 483 that one of the factors that the trial court should consider in resolving the question of immediate and complete desegregation or gradual and complete desegregation is the interest of the people who are affected in the community.

Dr. Burkhart was of the opinion that gradual desegregation would be best for the students and for the community. He felt that an abrupt change would affect the teachers and the students of both races and would create serious administrative problems.

Dr. Moffett, another Member of the Board, felt that Plan Nine was the best plan for the Knoxville schools and gave three principal reasons to support his belief, which are in substance as follows:

(a) First grade eliminates any educational advantages or disadvantages.

(b) The present Plan is more receptive to constituents.

(c) The present Plan is better for teachers and other personnel of the schools.

Andrew Johnson, a well-known lawyer of Knoxville, served as a Member of the Board from January 1, 1954

through December 31, 1957. He explained in detail the careful study made by Members of the Board and school personnel during the period that he was a Board Member.

A building program involving some eight million dollars was inaugurated and extensively carried on while he served as a Member of the Board. This program consumed considerable time of Board Members.

A series of meetings were held by Board Members with the Superintendent and his Staff during the year 1955 when desegregation matters were discussed. The initial attitude of the Board was to comply with the law with respect to desegregation as declared by the Supreme Court in the *Brown* Case. In 1954, the Members of the Board felt that desegregation could be effectuated without too many problems because the citizenship at that time appeared to be passive. Later, the Board Members began to hear rumbling of the disturbances from citizens and when actual violence began in Clinton, it caused the Board to go slow. This violence gave rise to a consciousness of the Members of the Board of the dangers of making an unwise step. The Board was delayed by circumstances over which it had no control.

The opinion of the public influenced the actions of the Board. The Board was looking at local conditions. Threats of violence were made if desegregation were inaugurated. On June 10, 1957 some fifteen citizens appeared before the Court and some of them suggested that the Board Members resign rather than institute desegregation. There was real danger.

One John Kasper appeared before the Board that night. Mr. Johnson received a number of telephone threats. The Members of the Board were afraid of physical violence against the colored children. At that time, the colored principals of the schools felt that desegregation should be

given thorough consideration, but that it should not start immediately.

The dynamiting and other violence in Clinton and Nashville were other causes for the Board moving towards desegregation more slowly.

Mr. Marable, is Supervisor of Child Personnel. He handles transfers. He stated that the schools were overcrowded in some sections. Transfers were comparatively easy under the old plan although they are considered carefully. If the reasons are good, a transfer is made. It is an administrative matter. Primarily, a child is expected to go to school in the zone of his residence.

Plaintiffs, Mrs. Barber, and Messrs. Robinson, Sr., Ward, Graves, Winton, Sr. and Goss, testified to having made applications for admittance of their minor children to white schools, all as shown in the complaint and the stipulation, and that they were denied admittance solely because of their race or color. Each of these plaintiffs gave a reason why he wanted his infant child to attend a white school, one of the reasons being that he or she lived near the white school.

This Court is of the opinion and finds that the foregoing evidence shows beyond question good faith on the part of the Board in making an honest effort to find the solution of a very troublesome problem, namely, a plan of desegregation that would best fit the needs of the Knoxville area and at the same time implement the decision of the Supreme Court in the *Brown* Case. The teaching of that case, as well as that of the cases of *Cooper* v. *Aaron*, *supra* and *Kelley* v. *Board of Education* (C. A. 6), 270 F. 2d 209, is that the problem of desegregation must be solved in accordance with the exigencies of the case and that the interest of the school children of both races, the interest of the school personnel and of the community involved are

the prime factors in resolving the issue; that local school problems differ and what would be a reasonable time to integrate in one community might be unreasonable in another community; that the question of speed is to be decided with respect to existing local conditions; that the operation of the public schools is the business of the local School Board and that the courts should not interfere with such operation unless it is necessary for the enforcement of constitutional rights; and that the Court should not substitute its judgment for that of the local School Board in the promulgation of plans of desegregation and that if the Board has acted in good faith its action should not be set aside so long as such action is consistent with the eventual establishment of a non-discriminatory school system at the earliest possible date consistent with the interest of the school children, school personnel and the community.

The Court finds that the Plan submitted by the Board is not only supported by the preponderance of the evidence, but by all of the evidence, with one exception. With reference to the technical courses offered in the Fulton High School to which colored students have no access, it directs that the defendants in this cause restudy the problem there presented and present a plan within a reasonable time which will give the colored students who desire these technical courses an opportunity to take them.

This Court is concerned—gravely concerned—with the incidents of unrest and violence which have attended the desegregation of schools in nearby communities. They have not only been made matters of evidence in this case, but some are matters with which this Court has had to deal, and of which it takes judicial notice. These incidents have been characterized by the bombing of homes and of school buildings and by acts of individual terrorism which have de-

stroyed the orderly atmosphere in which good schooling can thrive. They have revealed pockets of hate and lawlessness which are overshadowing imponderables in this case.

Glowing pictures of what may be, or ought to be, characterize the partisanship of those not called upon to make decisions. It is easy to ignore, and many of these partisans have ignored, considerations which weigh so heavily upon the Court. Some who might have taken responsibility have, despite the admonitions of the Supreme Court in the *Brown* and other cases, chosen not to assume it.

As the case has developed, the ultimate responsibility for decision rests with the Court. It alone must deal with the realities—realities with which it has had acrid experience.

If it decides wrongly, the transition towards the goal of a harmonious and unified school system—a goal to which all parties to this case subscribe—will receive an untold setback. If it decides rightly, there may well be smooth and steady progress toward full integration. Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there.

Perhaps the transition could be faster. Who can know? When a bridge is built or modified, engineers add a factor of safety far beyond the expected load. The analogy breaks down. In altering a school system, no one knows the load; there is no known factor of safety. Traditions, ways of thinking, aspirations, human emotions—all are involved. Emotions are sometimes stable, sometimes explosive. This Court has had experience with both. It rather anticipates

that the emotions of the people of Knoxville are under control. It does not know. It would have had the same expectation of another community. It was wrong.

All things considered, Plan Nine seems to offer more safety and more assurance for an orderly progression toward a fully unified school system. Under the evidence, there is less danger of disorder—more hope of steady progress. When the risks of which this Court is cognizant are taken into account, Plan Nine seems to meet the tests laid down by the Supreme Court. The Plan, with the reservation noted, is approved.

Present order in accordance with views herein stated.

ROBT. L. TAYLOR
United States District Judge

Judgment of District Court

Filed: August 26, 1960

This cause came on to be heard on August 8, 9, 10 and 11, 1960, upon the entire record, upon stipulations, oral testimony, depositions and exhibits, without the intervention of a jury, and upon briefs and argument of counsel, pursuant to which the Court on August 19, 1960, filed its Memorandum, all of which are herein incorporated by reference.

It is, therefore, ORDERED, ADJUDGED AND DECREED, as follows:

1. That the Plan of The Board of Education of the City of Knoxville, approved by said Board on April 4, 1960, and presented to this Court on April 8, 1960, be approved with the single exception that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them. The defendant Board of Education of the City of Knoxville, Tennessee is hereby ordered to put said Plan as approved by this Court into effect in accordance with the tenor thereof.

2. That the prayer of the plaintiffs for injunctive relief and their motion for preliminary injunction be, and the same hereby are, denied.

3. That the jurisdiction of the action is retained during the period of transition.

To the foregoing actions of the Court, as contained in Paragraphs numbers 1. and 2. hereinabove, the plaintiffs except.

ROBT. L. TAYLOR
United States District Judge

Opinion of Sixth Circuit

No. 14425

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Josephine Goss and Thomas A. Goss, Infants by Ralph Goss, Their Father and Next Friend, et al.,

Appellants,

—v.—

The Board of Education of the City of Knoxville, Tennessee, a Body Corporate or Continuous Legal Entity, c/o Dr. John H. Burkhart, President, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION.

Decided April 3, 1962.

Before: Cecil, Weick and O'Sullivan, Circuit Judges.

Cecil, Circuit Judge. This cause is before the Court on appeal from an order of the United States District Court for the Eastern District of Tennessee, Northern Division, concerning the desegregation of the school system of the city of Knoxville, Tennessee.

The appellants were plaintiffs in the District Court and are all Negro citizens of the United States and state of Tennessee, and residents of the city of Knoxville. The

are children who were attending the public schools of Knoxville, at the time this action was begun, and their parents or guardians. The action was brought by the named plaintiffs for themselves, individually, and on behalf of all persons resident of Knoxville, similarly situated.

The appellees were defendants in the District Court and are members of the school board of the city of Knoxville, together with the superintendent of schools and other administrative officers of the Knoxville school system. They are sued in their official capacities and as individuals.

The parties will be referred to hereinafter, respectively, as plaintiffs and defendants.

The complaint was filed on December 11, 1959, and invoked jurisdiction by virtue of sections 1331, 1343, 2201 and 2202, Title 28 U. S. C. and sections 1981 and 1983, Title 42 U. S. C. By their complaint, the plaintiffs seek orders restraining the defendants from refusing to admit the named plaintiffs to certain schools operated by them as so-called "white" schools, on account of plaintiffs' race or color; for an order declaring the custom, policy, practice or usage of excluding plaintiffs and other persons similarly situated from any schools of the city of Knoxville solely because of race, pursuant to certain constitutional and statutory provisions of the state of Tennessee, to be unconstitutional and void; for a permanent injunction restraining the defendants from operating their schools on a biracial basis, and in addition thereto for an order requiring the defendants to present to the Court a plan "designed to bring about good faith compliance with the decision of the Supreme Court of the United States in *Brown* v. *Board of Education*, 347 U. S. 483, at the earliest practicable date throughout the Public School System of the City of Knoxville."

The defendants in their answer admit that the schools of Knoxville, at the time this action was begun, were operated on the basis of separate schools for white children and separate schools for Negro children. They say this was in accordance with constitutional and statutory provisions of the state of Tennessee (Art. 11, Sec. 12. Tenn. Const., Secs. 49-1005, 49-1107, and 49-3701, Tenn. Code); that they did not feel that they could change this system without the compulsion of law; that the schools for Negroes were excellent and that there was no discrimination against them in the type of education they received; that while there were white teachers for white children and Negro teachers for Negro children, they were paid on the same basis; that since the *Brown* decision, they have studied plans of integration, but that up until this time delay has been well advised. They say they "owe no apologies to anyone, and make none."

After the complaint was filed, the trial judge gave the defendants until April 8, 1960, to submit a plan of integration. A plan was submitted in accordance with this order and the principal question now before this Court is whether that plan is adequate to comply with the decisions of the Supreme Court.

The plan called "Plan No. 9" provides for school zoning based upon location and capacity of school buildings and admission to schools by reason of residence in a zone without reference to race; discontinuance of racial segregation in steps of one grade a year, beginning with the first grade, effective with the school year, beginning 1960-61, and a system of transfers in which the following will be recognized as some of the valid conditions for transfer: "a. When a white student would otherwise be required to attend a school previously serving colored students only;

b. When a colored student would otherwise be required to attend a school previously serving white students only; c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

The plaintiffs objected to the plan for the reasons that, considering the five years that had already elapsed since the *Brown* decision, twelve years was too long a period to accomplish complete desegregation; that the board had not shown that the delay was necessitated by any administrative problems enumerated by the Court in the *Brown* decision; that it deprived Negro students already enrolled in school of an unsegregated education; that it deprived Negro students of an opportunity for education in certain vocational schools and summer courses; and that the transfer plan would operate to perpetuate segregation of the races in the public school system.

The case was tried to the court and a judgment entered on August 26, 1960. By this judgment, the court denied injunctive relief to the plaintiffs and approved the plan as submitted, except "that the defendants in this cause are hereby directed to restudy the problem presented with reference to the technical and vocational courses offered in the Fulton High School, to which colored students have no access, and present a plan within a reasonable time which will give the colored students who desire these technical and vocational courses an opportunity to take them." It was further ordered that the board should put the plan as approved into effect.

On May 17, 1954, the Supreme Court decided, in *Brown v. Board of Education*, 347 U. S. 483, 495 (known as the first *Brown* case), "that in the field of public education the doctrine of 'separate but equal' has no place. Separate

educational facilities are inherently unequal." The Court held that segregation of Negro and white children for school purposes on a racial basis deprived Negro children of equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. Thereafter, the maintenance of "Negro" schools and "white" schools was a violation of the United States Constitution.

The Court, according to the second *Brown* decision, 349 U. S. 294, realized that the transition required by its first opinion, from a custom and practice of so long standing, could not be easily accomplished and that administrative problems would be encountered which would prevent immediate abandonment of the biracial systems then in effect.

The court said, at p. 299: "Full implementation of these constitutional principles may require solution of varied local school problems." And at p. 300: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles." . . . "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling." And finally, the classic admonition that the district courts should make such orders as were necessary to admit all students "to public schools on a racially nondiscriminatory basis with all deliberate speed."

It was thereby recognized that some planning would have to be done to adapt a particular local system to the new method of operation and that in the process the rights of some individuals would have to be subordinated to the common good of posterity. In *Boson* v. *Rippy*, 285 F. 2d 48, the Fifth Circuit reversed the District Court when it

ordered immediate en masse desegregation, and instructed it to require the board to submit a plan.

We appreciate that in such a transition, as is here involved, emotions are deeply stirred and sensitive feelings touched. But these must give way to the mandates of the Supreme Court. As that Court said in *Cooper* v. *Aaron*, 358 U. S. 1, 16, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."

It has been nearly eight years since the first *Brown* decision and under the plan before us the first and second grades are now integrated. The evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision. That the operation of schools on a racially segregated basis is a violation of the Fourteenth Amendment and that the constitutional and statutory requirements of the state of Tennessee prohibiting the mixture of races in schools cannot be enforced are no longer debatable or litigable questions. This has been obvious and evident since May, 1954.

The position of the board that it would continue to operate under these unenforcible laws, until compelled by law to do otherwise, does not commend itself to the Court, for the acceptance of a plan that provides for a minimum degree of desegregation. In the second *Brown* case, the Court said, at p. 300: "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." In our judgment, the defendants have not sustained this burden. We do not think that the twelve-year plan of desegregation adopted at this late date meets either the spirit or specific requirements of the decisions of the Supreme Court.

The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of a such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In *Boson* v. *Rippy*, *supra*, the court said, at p. 46, the transfer feature "should be stricken because its provisions recognize race as an absolute ground for the transfer of students, and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands.

Some of the named plaintiffs seek orders restraining the defendants from refusing them admission to certain white schools. The district judge denied the requests for such orders. The questions presented by this phase of the case are moot as to some of the plaintiffs for the reason that they have now graduated from high school. When the defendants have complied with the mandate of this

Court to submit an accelerated plan, looking to the reorganization of the Knoxville schools on a racially nondiscriminatory basis, the questions of individual admission to so-called "white" schools may be moot as to some of the other plaintiffs now in elementary schools.

Judge Taylor wisely withheld aproval of the plan insofar as it denied Negro students the right to take the technical and vocational courses offered at Fulton High School. The board should, as he suggested, present within a reasonable time a plan that would permit all Negro students who desire and are qualified to have an opportunity to take the special courses of this high school.

As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan.

We think Judge Taylor was correct in denying injunctive relief and as he so eloquently said: "Some individuals, parties to this case, will not themselves benefit from the transition. At a turning point in history some, by the accidents of fate, move on to the new order. Others, by the same fate, may not. If the transition is made successfully, these plaintiffs will have had a part. Moses saw the land of Judah from Mount Pisgah, though he himself was never to set foot there."

In conclusion, we affirm the judgment of the District Court in the following respects; the approval of the plan insofar as it pertains to school grades already integrated; the approval of the plan as to items three and four thereof, providing for zoning or districting based upon location

and capacity of school buildings and the permission of students to attend schools designated for their zones; the approval of the plan as to transfers subject to it being used for proper school administration purposes and not for perpetuation of segregation; the rejection of the plan so far as it pertains to Fulton High School and the order to the board to resubmit a plan in a reasonable time that will permit Negro students to have the advantage of the special courses of that high school and the denial of injunctive relief.

We modify the judgment of the District Court insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan. It is not the function of this Court to formulate or dictate to the board a plan for the operation of the Knoxville schools. It is, likewise, not our intention to require immediate total desegregation. We do believe, however, that more grades than contemplated by the board's plan should now be desegregated. In the light of the board's experience with the present plan, it should be enabled to submit an amended plan that wil accelerate desegregation and more nearly comply with the mandate of the Supreme Court for "good faith compliance at the earliest practicable date."

The case is remanded to the District Court with instructions to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation, in accordance with the views herein expressed.

Judgment of Sixth Circuit

April 3, 1962

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part, modified in part, and the cause is remanded for further proceedings consistent with the opinion filed herein.

Approved for entry:

/s/ LESTER L. CECIL
United States Circuit Judge

APPENDIX B

Opinions and Judgments in *Maxwell* Case

District Court Findings of Fact, Conclusions of Law and Judgment

Filed: November 23, 1960

This cause came on to be heard before the Honorable William E. Miller, District Judge, on October 27, 1960, and prior days of the term, upon the entire record, oral testimony and exhibits without the intervention of a jury, brief and arguments of counsel, from all of which the Court finds and holds as follows:

Findings of Fact

1. The plaintiffs, all of whom are Negro school children and their parents and are citizens and residents of Davidson County, Tennessee, filed this action on 19 September, 1960, seeking declaratory and injunctive relief against enforcement of the custom, practice and policy of the defendant, County Board of Education of Davidson County and its Superintendent of Schools, J. E. Moss, requiring racial segregation in the County Schools and refusing to admit certain of the plaintiffs to certain schools solely because of their race or color. Plaintiffs also prayed for an order requiring defendants to submit a plan for reorganization of the entire County School System into a unitary nonracial school system, including plans for elimination of racial segregation in teacher and other personnel assignments, school construction, and the elimination of any other discrimination in the operation of the school system or in the school curriculum which are based solely upon race or color.

2. The defendants, Frank White; S. L. Wright, Jr.; F. K. Hardison, Jr.; Ferriss C. Bailey; E. D. Chappell; Aubrey Maxwell; and Olin White, together comprise all the duly elected members of the defendant County Board of Education of Davidson County, Tennessee, and are sued

in their individual and official capacities together with said Board of Education, which is sued as a continuous body or entity. Defendant, J. E. Moss, is the duly elected or appointed County School Superintendent and/or Superintendent of Public Instruction of Davidson County, and is sued in both his individual and official capacity. The Board of Education is vested with the administration, management, government, supervision, control and conduct of the public schools of said County, and defendant, J. E. Moss, as administrative agent for the Board, has immediate control of the operation of the County Schools, and serves as a member of the Executive Committee of the Board.

3. The defendants, acting under color of the laws of the State of Tennessee and County of Davidson, have pursued for many years and are presently pursuing a policy, custom, practice and usage of operating a compulsory racially segregated school system in and for said County. The racially segregated school system operated by defendants consists of a system of elementary, junior high, and high schools, limited to attendance by white children and negro children, respectively, of the County of Davidson. Attendance at the various schools is determined solely upon race and color. A dual set of school zone lines is also maintained. These lines are based solely upon race and color. One set of lines relates to the attendance areas for the Negro schools and one set to the attendance areas for the white schools. These lines overlap where Negro and white school children reside in the same residential area.

4. At the beginning of the September 1960, school term, the infant plaintiffs, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, made application individually and/or

through their parents to defendants for admission or transfer to Glencliff Junior High School and/or Antioch High School, same being "white" schools which are nearer to their residence than Haynes High School, the "Negro" school they are required to attend, and were refused said admission or transfer solely on account of their race or color. At the same time, the infant plaintiffs, Cleophus Driver, Christopher C. Driver, Deborah Driver, and Deborah Ruth Clark, made application individually and/or through their parents for admission or transfer to Bordeaux Elementary School, a "white" school which is nearer to their residence than Haynes School, the "Negro" school they are required to attend, and were refused admission or transfer by defendants, solely on account of their race or color. Had these infant plaintiffs been white children, they would have been admitted or transferred to the said "white" schools to which they applied.

5. The infant plaintiffs, Jacqueline Davis, Shirley Davis, George Davis, Jr., Robert Davis, Rita Davis, and Robert Rickey Taylor, reside nearer to a Negro school which they have been attending, but some of them accompanied the other plaintiffs when they made application for admission to said "white" schools, and all of them join in this action because they allege that they are being denied their right to enjoy a nondiscriminatory public education by reason of the compulsory racially segregated public school system which defendants are maintaining and operating in and for Davidson County.

6. At a preliminary hearing on 26 September, 1960, this Court reserved judgment on motions by defendants to strike and/or dismiss those portions of the complaint com-

plaining of segregated teacher and personnel assignments but ordered the defendants to submit a complete and substantial plan which will accomplish complete desegregation of the public school system of Davidson County, Tennessee in compliance with the requirement of the Fourteenth Amendment to the Constitution of the United States.

7. Pursuant to said order of the Court, the defendants subsequently filed with the Court the following plan for desegregation of the school system:

PLAN

1. Compulsory segregation based on race is abolished in Grade One of the Davidson County Schools for the scholastic year beginning in September 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Two in September 1962, Grade Three in September 1963, Grade Four in September 1964, etc.

2. A plan of school zoning based upon location of school buildings, transportation facilities and the most recent scholastic census, without reference to race, will be established for the administration of the first grade, and other grades as they are desegregated according to the gradual plan.

3. Students entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may become necessary in particular cases.

4. Application for transfer of first grade students, and subsequent grades according to the gradual plan,

from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration.

5. The following will be regarded as some of the valid conditions for requesting transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only.

   b. When a colored student would otherwise be required to attend a school previously serving white students only.

   c. When a student would otherwise be required to attend a school where the majority of students in that school, of in his or her grade, are of a different race.

6. A plan of pupil registration to be held each Spring to aid in formulating necessary arrangements for the opening of schools in the Fall, such as available room, teaching aids, textbooks, pupil immunizations, zoning, and transportation facilities, will be continued.*

7. Transportation will be provided to all students that are eligible for bus service.*

8. Thereafter, the plaintiffs filed the following specifications of objections to said plan:

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* This has been done for years.

District Court Findings of Fact, Conclusions of Law and Judgment, November 23, 1960

SPECIFICATION OF OBJECTION TO PLAN FILED BY COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY

The plaintiffs, Henry C. Maxwell, Jr., *et al.*, respectfully object to the plan filed in the above entitled cause on or about the 19th day of October, 1960, by the defendant, County Board of Education of Davidson County, Tennessee, and specify as grounds of objection the following:

1. That the plan does not provide for elimination of racial segregation in the public schools of Davidson County "with all deliberate speed" as required by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

2. That the plan does not take into account the period of over six (6) years which have elapsed during which the defendant, County Board of Education of Davidson County, has completely failed, neglected and refused to comply with the said requirements of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. That the additional twelve (12) year period provided in said plan is not shown to be "necessary in the public interest" and "consistent with good faith *compliance* at the earliest practicable date" in accordance with the said requirement of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. That the defendants have not carried their burden of showing any substantial problems related to public school administration arising from:

a. "the physical condition of the school plant";

b. "the school transportation system";

c. "personnel";

d. "revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis";

e. "revision of local laws and regulations which may be necessary in solving the foregoing problems";

as specified by the Supreme Court in *Brown* v. *Board of Education* (May 31, 1955) 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 653, which necessitate the additional time contemplated by their plan for compliance with the constitutional requirement of a racially unsegregated public educational system.

5. That the plan is manifestly a substantially exact copy of the "Nashville Plan" adopted by defendants without reference to the local conditions in Davidson County as a minimum plan predicated on subjective and mental fears of the defendants as to possible community hostility or friction among students, and is not supported by a showing of any objective administrative conditions or problems which legally justify its complete deprivation of the constitutional rights of plaintiffs and all other children now in school to an integrated education by projecting the bar of segregation into the next twelve years.

6. That the plan forever deprives the infant plaintiffs and all other Negro children now enrolled in the public schools of Davidson County, of their rights to a racially unsegregated public education, and for this reason violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the plan wholly ignores and fails to comply with the statement of this Court from the Bench on 26 September, 1960, holding that the individual plaintiffs "have been denied their constitutional and legal rights", and suggesting that they be accorded these rights by defendants voluntarily rather than by court order, in that under the plan the individual plaintiffs can never be admitted to an integrated school and are forever deprived of their rights to a racially integrated public education in Davidson County.

8. That the plan fails to take into account recent annexation by the City of Nashville of a large area of surrounding Davidson County resulting in the public schools of said County becoming a part of the City of Nashville School System, which latter School System is now desegregated from the first through the fourth grades.

9. That the plan fails to take into account the rights of the infant plaintiffs and other Negro children similarly situated and forever deprives them of their rights to enroll in and attend any technical or other special or vocational schools, summer courses and educational training of a specialized nature as to which enrollment is not based on location of residence.

10. Paragraph five (5) of the plan violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operate to perpetuate racial segregation.

11. That the plan contemplates continued maintenance and operation by defendants of "Negro" and "white" schools substantially designated by race, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, in that it fails to make any provision for the reorganization of the entire County School System into a unitary, nonracial school system so as to include a plan for the assignment of teachers, principals and other school personnel, as well as school children, on a nonracial basis; for the allotment of funds, construction of schools and approval of budgets on a nonracial basis; and for the elimination of all other discriminations in the operation of the school system or in the school curriculum which are based solely on race and color.

WHEREOF, the plaintiffs pray:

1. That the Court grant their motions for temporary restraining order and preliminary injunction so as to require the immediate admission by defendants of the individual plaintiffs to the public schools of Davidson County, Tennessee on an unsegregated basis.

2. That the declaratory and permanent injunctive relief prayed for in their complaint be granted, said injunctive relief to be effective not later than the beginning of the Spring Semester or Term of the public schools of Davidson County in January 1961.

3. That the defendants be required by the Court to reorganize the entire County School System of Davidson County, Tennessee into a unitary nonracial school system, including all of the matters prayed for in the sixth prayer of the complaint filed in this cause.

9. At the hearing on said plan on 24 October 1960, the defendants offered, in support of the plan, the testimony of Mr. Ferriss C. Bailey, Chairman of the Special Committee of the Board charged with preparing the plan, who had been a member of the Board for several years and previously had been a member of the City of Nashville Board of Education, and who testified that the plan was prepared by the Staff, and that the Board accepted and approved the plan and that he thought it a wise plan. Mr. J. E. Moss, the County Superintendent for many years, testified as an expert that he believed the plan to be a wise and workable one; Mr. W. H. Oliver, Superintendent of Schools of the City of Nashville, testified as an expert that the Nashville grade a year "stair-step" plan initiated under Court order in 1957 had proved a wise and workable one for Nashville. In addition, the Attendance Officer, Psychologist and Transportation Officer of the County Schools, testified as to data relating to school population, pupil achievement levels and school bus transportation respectively, in the County School System. Defendants also introduced a zoning map and attendance schedule showing

the projected maximum expected distribution of Negro school children in presently white County Schools under nonracial zoning. All of said staff members had several years experience in their respective positions in Davidson County, and were intimately acquainted with conditions in that county and all problems involved in desegregation therein.

10. In opposition to the plan, plaintiffs introduced the testimony of Dr. Herman Long, Director of the Department of Race Relations, American Missionary Association of the Congregational Church, and teacher of Sociology in Fisk University, Nashville, Tennessee, for several years, an expert in the field of race relations in the United States; Dr. Eugene Weinstein, Assistant Professor of Sociology in Vanderbilt University, Nashville, Tennessee, an expert in the field of child development, who has conducted a recent research study of attitudes of Negro parents involved in public school desegregation in the City of Nashville, located within Davidson County, Tennessee; Dr. J. Masuouka, Professor of Sociology and Chairman of the Department of Social Science at Fisk University, Nashville, Tennessee for several years, an expert in the field of race relations among peoples of the world; and the plaintiffs, Henry C. Maxwell, Sr., Mrs. Annie P. Driver, and Mrs. Floy Clark (the latter by stipulation). The plaintiffs testified that they objected to the plan because it would prevent their children now in school from enjoying their constitutional rights to a nonracially discriminatory public education, that their children wanted to enjoy such an education now, and that they feel their children are being injured by the racially segregated education they are now

receiving. The plaintiffs' aforesaid expert witnesses were of the opinion that desegregation could reasonably be effected in the Davidson County School System within one year; and that the pupil transfer provision contained in the proposed plan, as drafted, would necessarily tend to perpetuate segregation. However, these witnesses, although expert witnesses and outstanding men in their respective fields, have had no actual experience with or responsibility for the administration of the schools in Davidson County and lack the same intimate knowledge of local conditions possessed by defendants' witnesses.

11. This Court approved in the case of the City of Nashville a plan of gradual desegregation after considering the particular facts which prevailed in that case. This plan of gradual desegregation, according to the testimony in this case, has worked well in the City of Nashville and has proved to be a workable and a feasible plan of desegregation. It has proved to be, in the opinion of the Superintendent of City Schools, a very wise plan for this community.

12. As stated, the school authorities of Davidson County, including the members of the staff, are close to the situation in Davidson County, are more intimately acquainted with them and have more knowledge about them than anyone else could possibly possess and the primary responsibility rests with these authorities, whose prerogatives and rights should not be usurped by the Courts.

13. From the testimony in this case it is evident that:

a. A plan of gradual desegregation works with a minimum of difficulties in this community.

b. Practically all of the schools of Davidson County are or may be affected by a plan of desegregation for the reason that the areas populated by Negroes are greatly scattered throughout the County.

c. There has been a tremendous increase in the school population in Davidson County over the past several years, with the result that practically all of the school housing facilities are crowded or overcrowded and the teacher-pupil load is at a peak in the system.

d. The County school system operates a transportation system, which system is presently operated at peak capacity, and the bus drivers are solely charged with maintaining discipline on the bus, in addition to their other duties, so that any factor which increases or tends to increase disciplinary problems on the buses likewise increases the hazards to the safety of the pupils. Discipline among the pupils on the buses is increased with a mixing of the races, especially when such is commenced at grade levels above the first and/or first and second grades.

e. Because the children of the two races have not been intimately associated due to proximity of residences in the County, a great emotional impact will be experienced by the children of both races following desegregation of the schools.

f. Negro children in the higher grade levels who have not previously attended desegregated schools have an achievement level substantially below that of white children, and such disproportion in achievement level

increases in direct proportion to the grade of the child so that any complete desegregation, except upon a graduated basis, would create additional difficulties for the children of both races.

g. Any change of organization or plan in the school system, other than at the end of a school year or a school semester, would cause confusion and disruption of classes with an accompanying loss of teacher time and student time.

14. The school in the Bordeaux community, one of the schools where the plaintiffs have made application for enrollment, has been partially destroyed by fire, and the school population there is presently being cared for on a make shift basis, with all existing facilities overtaxed. The Antioch School, one of the schools where plaintiffs made application for enrollment, is the most overcrowded school in the entire system, and the time consumed in traveling to the Antioch School by bus from the residence of these plaintiffs is as great as the time consumed by such plaintiffs in traveling by bus to the Haynes High School, to which they are presently assigned.

15. It is particularly desirable to have the school system of the City of Nashville and that of Davidson County operating on a parallel basis.

Conclusions of Law

1. This Court has jurisdiction of the parties and of this action, which is filed pursuant to Title 28, United States Code, Sections 1331, 1343, 2001 and 2202, and Title 42, United States Code, Section 1983, for injunctive and de-

claratory relief to redress rights of the plaintiffs secured by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and by the Act of May 13, 1870, Chapter 14, Section 16, 16 Stat. 144 (Title 42, United States Code, Section 1981).

2. This is a class action brought not only by the plaintiffs for their own benefit but also on behalf of all other persons similarly situated.

3. The Court at the outset considers the case with the established principle that compulsory racial segregation is unconstitutional and that the plaintiffs and those they represent are entitled to have their rights declared and enforced accordingly.

4. In approving a plan of gradual desegregation in the case of the City of Nashville, after considering the particular facts which prevailed in that case, the Court made the statement in substance that each case must be determined on its own facts and that a decision elsewhere in the United States may or may not be relevant depending upon the conditions, whether or not they were comparable to the situation which prevailed here, and that, after all, this was a problem which must be determined locally and in accordance with local conditions. That case was appealed to the Court of Appeals of this Circuit, and was affirmed in a unanimous decision of that court. Thereafter at a later date the Supreme Court of the United States refused to review it by denying certiorari, which left, insofar as this Court is concerned, the decision of the Court of Appeals in full force and effect as stating correct legal principles.

District Court Findings of Fact, Conclusions of Law and Judgment, November 23, 1960

5. This Court does not hold that automatically the Nashville Plan constitutes the plan which should be applied to Davidson County. The pertinent factors must be weighed and assessed, and if the factors are substantially similar, then the precedent of that case should guide the Court in the decision of this case. If they are materially dissimilar, then that case would not apply. Considerable flexibility is involved in applying the controlling legal principle.

6. The Court must decide the case in accordance with what it thinks is a realistic plan for the community itself, considering all of the conditions and circumstances involved, the administrative problems, the personnel problems, and any other relevant and pertinent factors, one of the important ones of which is the efficient and harmonious operation of the school system itself. The Court must not disrupt and destroy the school system. That fact must be kept in mind always.

7. The Supreme Court has recognized the principle that the primary responsibility in assessing and weighing these factors rests with the constituted school board and authorities.

8. The Court does not have any doubt that the School Board has acted in good faith, and has fully carried the burden of proof to show the feasibility of the principal features of the proposed plan.

9. The plan presented by the defendant County Board of Education should be approved by the Court with the following exceptions and modifications:

a. Instead of the first grade being desegregated, as contemplated by said plan, the Court is of the opinion and holds that the first four grades should be desegregated at one time. This will equalize the plan with the City of Nashville Plan. It is particularly desirable to have the grades of the two systems operation on a parallel basis.

b. In view of the delay which has already occurred in regard to desegregation, the plan should be effective and should be put into operation (that is, the first four grades should be desegregated) at the beginning of the next school semester beginning January 1961, rather than the next school year; and the first five grades will be desegregated beginning September 1961.

c. A specific provision should be included in the decree for the complete elimination of any possible discrimination with respect to the summer classes which are attended by outstanding students. In other words, facilities on a nondiscriminatory, desegregated basis will be provided for students of this type, and provision will be made to notify all teachers in the system, both colored and white, of the availability of these classes, so that there will be no doubt about the colored students having knowledge of the opportunities made available in this respect.

d. Specific notice will be given to all parents of the zone in which their children live. In other words, before the beginning of the school year, the parents of all children will receive specific notice of the zone in which their children fall for the purpose of attending classes

in order that there may be removed any possible doubt about some people not having full information.

e. The Court will retain jurisdiction of this case throughout the period of transition.

10. The legal rights of all plaintiffs are recognized and declared but they are enforced in accordance with the provisions of the plan with the above modifications. Said plan is not a denial of the rights of the individual plaintiffs, but is a postponement in enforcement of the rights of some of the plaintiffs in the interest of the school system itself and the efficient, harmonious, and workable transition to a desegregated method of operation.

11. Judgment should again be reserved, for the present, on defendants' motions to strike and to dismiss certain portions of the complaint relating to segregated teacher and personnel assignment, and on the matters raised in the complaint which are involved in said motions, pending submission of further memoranda and argument of counsel.

12. The prayer of the plaintiffs for injunctive relief should be denied, except for the matters as to which judgment is reserved.

JUDGMENT

It is accordingly ORDERED, ADJUDGED and DECREED as follows:

1. That the plan submitted by the County Board of Education of Davidson County, Tennessee, is approved, except in the following particulars:

a. Compulsory segregation based on race is abolished in Grades One through Four of the Davidson County Schools for the Second Semester of the 1960-61 school year beginning January 1961, and thereafter for one additional grade beginning with each subsequent school year, i.e., for Grade Five in September 1961, Grade Six in September 1962, etc.

b. As respects the summer classes attended by outstanding students, there will be no segregation based on races, and notice of such will be immediately given by the School Board to all teachers in the Davidson County school system, both Negro and white, of the availability of these classes.

c. The Davidson County School Board will, prior to the beginning of the Second Semester of the 1960-61 school year, and prior to the beginning of each school year thereafter, give specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes.

2. The prayer of the plaintiffs for injunctive relief be, and the same is hereby denied, except with regard to those matters as to which judgment is hereinafter reserved.

3. Jurisdiction of this case is retained by the Court throughout the period of transition.

4. Judgment is reserved on the question of the motion to strike and those portions of the motion to dismiss not

hereinbefore overruled, and on the matters raised in the complaint which are involved in said motions.

To the foregoing action of the Court in approving the plan submitted by defendants and in denying plaintiffs' prayer for injunctive relief, the plaintiffs except.

This the 23rd day of November 1960.

WM. E. MILLER
United States District Judge

District Court Findings of Fact, Conclusions of Law and Judgment

Filed: January 24, 1961

This cause came on to be heard before the Honorable William E. Miller, District Judge, without the intervention of a jury, on January 10, 1961, upon the entire record, and especially upon the motion for further relief and the motion for new trial and for appropriate relief heretofore filed by plaintiffs, upon the merits of the cause as to the issues heretofore reserved by the Court, upon the motion to intervene in the cause filed by Porter Freeman, individually and in behalf of others, the testimony of witnesses heard in open court, and briefs and arguments of counsel, from all of which the Court finds and holds as follows:

Findings of Fact

1. With respect to the notices furnished by the defendants to parents of school children affected by the desegregation plan heretofore approved and the parents of all other children attending the schools in Davidson County, the Court finds that such notices are not confusing or misleading and further finds that there has been no showing of any confusion or misleading as a result of the form of the notices.

2. The Court finds that to grant the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr. and Benjamin Grover Maxwell to be admitted to schools as exceptions to the plan approved by the Court would in effect destroy the plan in this locality.

3. The Court finds that teachers and sustaining personnel are assigned to the schools based upon their particular aptitude, qualifications, background and other factors, all

of which are considered by the Board, and that one of these factors has been race.

4. The difficulties and problems which will be encountered in making the transition from a segregated system to a nonsegregated system would be enhanced and complicated if the Court should at this time require the assignment of teachers and supporting personnel in the schools of the system on a basis different from that which has heretofore been followed. It would in all probability lead to a situation where a plan which would otherwise be successful and would operate smoothly and harmoniously would be impaired and rendered unworkable.

CONCLUSIONS OF LAW

1. The Board of Education acted in good faith in preparing the notices to parents under the desegregation plan and in mailing and distributing them. The School Board and the attorney representing the School Board and all of the defendants acted in good faith in undertaking to carry out the order of the Court and the Court holds that they did so in substantial effect.

2. The notices to parents heretofore furnished by defendants to said parents under the desegregation plan were adequate. The Court finds no objection to them.

3. The notices to parents should be given to those who are affected by said plan of desegregation and not to anyone else, but the form of the notice in the future should be submitted to opposing counsel in advance of its mailing, giving them sufficient time to file objections with the Court;

and the Court will impose that requirement, believing that it is reasonable.

4. With respect to the request of the four individual plaintiffs, Cleophus Driver, Deborah Ruth Clark, Henry C. Maxwell, Jr., and Benjamin Grover Maxwell, to be admitted to schools as exceptions to said desegregation plan, the Court is of the opinion that to grant such exceptions would be in effect to invite the destruction of the very plan which the Court has held is for the best interest of the school system of Davidson County. It is not a plan which is designed to deny the constitutional rights of anyone. It is a plan which is designed to effect an orderly, harmonious, and effective transition from a racially segregated system to a racially nonsegregated system of schools, taking into account the conditions existing in this particular locality. And the Court cannot see how these individual plaintiffs who brought this action are or would be entitled to any different treatment from any other children who attend the schools of Davidson County and are members of the class represented by the plaintiffs.

5. With respect to the issue reserved by the Court on the merits, as to whether or not there is any violation of the rights of the plaintiffs or of those represented by the plaintiffs where teachers are assigned in the County School System on the basis of race or where race is used as a factor in making assignments of teachers, the Court cannot go so far as to agree with the argument that this question has been finally settled by the decision in the Brown cases. But the Court does entertain the view that this question is a serious question under the Equal Protection Clause of the Fourteenth Amendment. Particularly is this true when

the Court considers the fact that a plan has been approved for Davidson County which includes a very liberal transfer provision. When this provision, although it is on a voluntary basis, is coupled with a policy (and the Court is not now finding that this policy exists in Davidson County) which would assign teachers on the basis of race, then a serious question is presented to the Court as to whether there is not actually being thereby perpetuated the very condition which the Supreme Court said could not be perpetuated, and that is a segregated system of public schools. The Court is required to view the matter in terms of the entire school system, and in terms of the quality of education which the students are entitled to receive.

6. The Court finds that it is not necessary to determine the question relative to the assignment of school teachers and other personnel at this time for the reason that the Court does not believe (even if it should now hold and declare that the plaintiffs do have the right to attend a school system where race is not one of the factors considered in the assignment of teachers) that an injunction should issue at this time.

7. In the opinion of the Court, it is the better and wiser course for the Court to follow, even if the foregoing rights were declared as contended for by the plaintiffs, to withhold the granting of an injunction until the plan has had an opportunity to operate for a substantial period of time. The school authorities should have the benefit of experience in dealing with the operation of integrated schools. For these reasons, in the exercise of the Court's discretion, the Court would deny injunctive relief in this respect at this time.

8. This case will remain on the docket of the Court, and the Court will retain jurisdiction of the case during the period of transition; and the question with respect to the assignment of teachers, principals, and sustaining personnel can be renewed by the plaintiffs at a later date, and will be taken up and considered at that time, after the plan has had an opportunity to be operated for a substantial period of time.

9. The motion to intervene filed by Porter Freeman individually and in behalf of others, is not well taken for the reasons, first, that it comes too late; second, that it is contrary to the plan which the Court has already approved; and third, that it contemplates putting into effect a plan which has specifically been held to be unconstitutional by this Court and by the Court of Appeals of the Circuit. For these reasons the motion to intervene is not well taken and will be denied.

JUDGMENT

It is accordingly ORDERED, ADJUDGED AND DECREED as follows:

1. That the relief prayed for in the motion for further relief filed by plaintiffs be and the same is denied, with the exception that the form of the notices to parents in the future are directed to be mailed by defendants to counsel for plaintiffs in advance of mailing, so as to give them sufficient time to file with the Court objections to the form of said notices.

2. The aforesaid notices to parents will be given to those who are affected by said plan of desegregation heretofore approved by the Court and not to anyone else.

District Court Findings of Fact, Conclusions of Law and Judgment, January 24, 1961

3. The motion for a new trial and for appropriate relief filed by plaintiffs is overruled and denied.

4. Injunctive relief with respect to the issues heretofore reserved by the Court concerning assignment of teachers, principals, and sustaining personnel in the schools on the basis of race is denied at this time; and the Court further reserves ruling with respect to the assignment of teachers and other school personnel, including the right of school children or their parents to raise such question.

5. This case will remain on the docket of the Court, and the Court will retain jurisdiction of the case during the period of transition from a racially segregated to a racially desegregated school system. The question with respect to assignment of teachers, principals, and sustaining personnel may be renewed by the plaintiffs at a later date. It may be taken up and considered at that time after the plan has had an opportunity to be put into operation for a substantial period of time.

6. The motion to intervene filed in this cause by Porter Freeman is overruled and denied.

To the foregoing action of the Court in denying their motion for further relief and their motion for new trial and for appropriate relief, and in denying the relief prayed for in the complaint with respect to said issues heretofore reserved by the Court, the plaintiffs respectfully except.

This the 24 day of January, 1961.

WM. E. MILLER
United States District Judge

Opinion of Sixth Circuit

No. 14607

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HENRY C. MAXWELL, JR., ET AL.,

Plaintiffs-Appellants,

v.

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENN., ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

Decided April 4, 1962.

Before: MILLER, Chief Judge, CECIL, Circuit Judge, and DARR, Senior District Judge.

CECIL, Circuit Judge. This is an appeal from an order of the United States District Court for the Middle District of Tennessee concerning the desegregation of the public school system of Davidson County, Tennessee. This is the county in which the city of Nashville is located.

The appellants are Negroes and citizens of the United States and Davidson county. The adult plaintiffs are parents or guardians of the infant plaintiffs and reside with them in Davidson county. The infant plaintiffs are

school children who have been attending the public schools of Davidson county and who can satisfy all of the requirements for admission to the public schools operated by the defendant County Board of Education. The action was brought in the District Court by the plaintiffs, as a class action for themselves and on behalf of all others similarly situated.

The appellees are the County Board of Education, sued as a corporate or continuous body or entity, the individual members thereof, sued in their official capacity and as individuals, and the Superintendent of Schools, sued in his official capacity and as an individual.

The parties will be referred to hereinafter, respectively, as plaintiffs and defendants.

By this appeal three of the named infant plaintiffs seek a reversal of an order of the District Court denying them admission to certain schools heretofore denominated "white" schools. It is conceded that they live nearer to the schools to which they seek admission than they do to the so-called "Negro" schools which they are required to attend. It is also admitted that they were denied admission to these schools by reason of their race or color and that if they had been white children their requests would have been granted. The trial judge denied these plaintiffs admission to the schools to which they requested transfers.

He refused to approve the board's plan for a step-by-step, grade-a-year plan of desegregation, but modified it so as to require four grades to be desegregated as of January 1, 1961. This made the schools in Davidson county, outside of and contiguous with the city of Nashville, operate on a parallel basis with the city. As of now, five grades are desegregated.

The plan as approved included a transfer feature which is the same as the one in the Nashville plan. It provided that some of the valid conditions of transfer would be the following: "a. When a white student would otherwise be reuired to attend a school previously serving colored students only. b. When a colored student would otherwise be required to attend a school previously serving colored students only. c. When a student would otherwise be required to attend a school where the majority of students in that scho or in his or her grade, are of a different race."

Two questions are presented on this appeal. One, that the constitutional rights of some of the named plaintiffs are being violated in denying them the privilege of immediate transfer to schools that are nearer their homes than the ones they are required to attend, solely on the ground of race or color. Two, that the transfer feature of the plan violates the Fourteenth Amendment to the Constitution, for the reason that it provides for transfers to be made solely on the basis of race or color.

The same questions were decided in our opinion in *Josephine Goss, et al., Appellants* v. *The Board of Education of the City of Knoxville, et al., Appellees*, No. 14425, decided April 3, 1962. —— F. 2d ——.

In that case we said, on the first question: "As previously indicated, we think the Supreme Court contemplated that there would have to be plans for the transition and that some individual rights would have to be subordinated for the good of many. The smooth working of a plan could be thwarted by a multiplicity of suits by individuals seeking admission to grades not yet reached in the desegregation plan."

On the second question, we said: "We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. . . . A similar transfer plan was approved by this Court in *Kelly* v. *Board of Education of City of Nashville*, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924. We adhere to our former ruling with the admonition to the Board that it cannot use this as a means to perpetuate segregation."

Reference is hereby made to the *Knoxville* case for our full discussion on these questions. There is virtually no dispute on the pertinent facts of this case as found by the trial judge. We think the law, as applied by him to these facts, is in accord with the spirit and specific requirements of the pronouncements of the Supreme Court on the subject. *Brown* v. *Board of Education*, 347 U. S. 483; *Brown* v. *Board of Education*, 349 U. S. 294; *Cooper* v. *Aaron*, 358 U. S. 1. Judge Miller's Findings of Fact and Conclusions of Law are reported at —— Fed. Supp. ——.

For the reasons stated herein and in the *Knoxville* opinion, and upon the Findings and Conclusions of Judge Miller, the judgment of the District Court is affirmed.

Judgment of Sixth Circuit

April 4, 1962

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Middle District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ LESTER L. CECIL
United States Circuit Judge

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 217

OCTOBER TERM, 1962.

JOSEPHINE GOSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

HENRY C. MAXWELL, JR., et al.,
Petitioners,

v.

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al.

BRIEF

In Opposition to the Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

JOSEPHINE GOSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

HENRY C. MAXWELL, JR., et al.,
Petitioners,

v.

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al.

BRIEF

In Opposition to the Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The respondents, The County Board of Education of Davidson County, Tennessee, et al., file this their brief in opposition to the petition for writs of certiorari to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED.

As respects these respondents, the questions are:

1. Whether the petitioners, Henry C. Maxwell, Jr., et al., are deprived of their rights under the Fourteenth Amendment by the approval of a desegregation plan adopted for the public schools in Davidson County and approved by the District Court and the Circuit Court of Appeals, which provides among other things that transfer applications will be given consideration when such transfer is practicable and consistent with sound school administration and when "good cause therefor is shown" and which defines as one of those grounds of "good cause":

> "a. When a white student would otherwise be required to attend a school previously serving colored students only.
>
> b. When a colored student would otherwise be required to attend a school previously serving white students only.
>
> c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race."

2. Were the petitioners entitled to disrupt the desegregation plan approved by the District Court and by the Circuit Court for the Davidson County school system so as to have exceptions made in their favor?

STATEMENT OF THE CASE.

Following the initial hearing in the case of **Maxwell v. The County Board of Education** and pursuant to the direction of the District Court to formulate a plan for the orderly desegregation of the Davidson County schools, the

County Board of Education of Davidson County, Tennessee, appointed a special committee of its membership, to-wit, Ferriss C. Bailey, Frank White and S. L. Wright, Jr., which committee worked with the staff of the Board of Education to compile and submit the plan (R., Maxwell 64a).* This plan was then submitted to the entire Board of Education of Davidson County, which adopted it and submitted it to the Court (R., Maxwell 64a).

The plan, as submitted originally by the Board, abolished segregation based on race for Grade One in the Davidson County School System for the scholastic year beginning September, 1961, with an additional year to be desegregated each subsequent year thereafter; a zoning plan was adopted based upon the location of the school buildings, transportation facilities, scholastic population, etc., without reference to race; subject to exceptions necessary in the administration of the school system, thereafter the students in each desegregated grade would attend the school designated for their zone, unless transferred pursuant to their parents' request for good cause; transfers were permitted to be **applied for** and **consideration given** when made by parents or persons standing in the relationship of parents, provided **good cause** for such was shown and such transfer was **practicable** and **consistent with sound school administration**; and **among other conditions** upon which transfers could be granted by request, the plan provided that where a student would be required to attend a school where such student was in the extreme race minority, transfer requests would be **considered** (R., Maxwell 69a-71a).

Following a full hearing the Court accepted the plan as submitted by respondents, excepting that the Court re-

* References to the appendix of petitioners in the Maxwell case will be followed with a suffix "a," and references to respondents' appendix with the suffix "b."

quired the first four grades, rather than the first grade, to be desegregated effective with the commencement of the January, 1961, Term, in order to cause the Davidson County plan to become current with the plan in the educational system of the City of Nashville (R., Maxwell 132a).

The plan as proposed by the Respondents and as approved by the Court, with modifications as above noted, was supported by the testimony of persons experienced in the operation of the school systems within Davidson County, Tennessee. The first of these witnesses, the Honorable Ferriss C. Bailey, had served as the Chairman of the Committee of the School Board for the formulation of the plan. Mr. Bailey is an attorney and has served on the Board of Education of Davidson County for more than seventeen years, and prior to that time served on the Board of Education of the City of Nashville, located within Davidson County, for a period of six years (R., Maxwell 1b-3b). Mr. J. E. Moss has served for twelve years as the Superintendent of the Davidson County Schools and prior to that had served for twenty-five years as a teachor and supervisor in the Davidson County school system (R., Maxwell 3b-4b). Mr. William H. Oliver has served as Superintendent of the school system of the City of Nashville for the last two years plus, and prior to that had served as a principal and teacher in the school system of the City of Nashville for a period of thirty-three years (R., Maxwell 19b). Mr. Floyd Detchon has served for twenty-seven years with the school system of Davidson County in the various capacities of principal and attendance and research supervisor (R., Maxwell 25b). Mr. Melvin B. Turner has served in the school system of Davidson County for twelve years as Superintendent of Transportation (R., Maxwell 28b). The witness, Mr. Emmett Pettie, has served for a period of fourteen years with the Davidson County school system as a teacher and school psychologist (R., Maxwell 35b-36b). Mr. A. E.

Wright, who likewise testified in support of the plan, has served for a period of thirty-five years with the Davidson County school system as a teacher, coach, principal, supervisor and assistant superintendent (R., Maxwell 44b-45b). The other witness offered by the respondents in support of the plan and who assisted in the work of the staff in formulation of the plan was Mr. Joseph R. Garrett, who has served for twelve years with the Davidson County system in child welfare and attendance (R., Maxwell 46b).

As contrasted with these witnesses who had had daily contact with both the community and the school system of Davidson County, the petitioners produced the testimony of a Dr. Long, who had never taught or supervised in any public educational institutions in either Davidson County or elsewhere (R., Maxwell 227b); Dr. Eugene Weinstein, who had never taught or worked in or for or attended a public school in this area (R., Maxwell 41b); and Dr. J. Masuoka, whose experience was in general a study of race relations problems in Japan (R., Maxwell 42b-44b).

There are two school systems in Davidson County, Tennessee. One is the school system of the City of Nashville, which serves a school population of approximately 30,000 pupils (R., Maxwell 19b-20b). The other school system is the school system operated by the respondent, County Board of Education of Davidson County, Tennessee, which serves that portion of Davidson County outside of the City of Nashville and serves a school population of approximately 47,000 pupils (R., Maxwell 77a). The City of Nashville School System Plan for gradual desegregation was approved by the same District Court as considered the instant case and was approved by the Circuit Court for the Sixth Circuit in the case of **Kelley v. Board of Education**, 270 F. 2d 209 (Cert. denied, 361 U. S. 924).

As appears from the report of the Special Committee of the Davidson County School Board working with the staff

and from the testimony of the witnesses, there were many problems which had to be considered by the respondent, Board of Education, in order to formulate a plan which might work in Davidson County, Tennessee. One of the problems to be considered was the fact that the Davidson County School System was terribly over-crowded at the time and in fact and in spite of an active building program, seventy portable or temporary buildings were being used to house the excess of pupils (R., Maxwell 7b, 15b-16b, 25b-26b). Out of the School System of Davidson County, forty-four of the schools would be affected by a desegregation plan (R., Maxwell 9b). Another factor was the concentrations of the Negro population and the white population in the County outside of the City, which would be the area served by the Davidson County School System (R., Maxwell 66a, 67a). In addition, the Davidson County School System offers transportation to its students residing more than one and one-fourth miles from the school attended, and any alteration of the existing school system would create transportation problems (R., Maxwell 10b-11b). The transportation problem was not only a problem of administration and operation of the school bus system, but likewise involved discipline on the buses where the driver was charged not only with the operation of the bus, and the safety of its operation, but the discipline of the children riding the bus, which disciplinary problems would increase with integration (R., Maxwell 10b-11b, 29b-30b).

Another important factor to the School Board, which was considered by it, was the custom in the community over many years of a segregated school system, which had to be overcome (R., Maxwell 14b, 17b, 18b) and the fact that friction would arise among the student bodies by too rapid a departure from the status quo (R., Maxwell 60a, 67a).

In addition, educational wise any change of a school for any cause has an adverse effect on the pupil (R., Maxwell 13b-17b, 21b), and precipitous action would cause community disturbances, property loss and grave administrative difficulties (R., Maxwell 65a). The School Board in preparing and offering the plan also considered the variance in achievement levels at higher school grade levels as between the Negro school population and the white school population and its effect on the entire school population and the educational system from an integrated system (R., Maxwell 16b, 18b, 22b, 37b-40b). Any change in the school system for any cause and for any reason requires a great amount of administrative work, which is time consuming, and the greater the change the more time required to work out the administrative problems (R., Maxwell 17b).

Another factor which strongly influenced the Board in recommending the plan adopted, with certain modifications, by the District Court for orderly integration was that the City of Nashville plan, approved by the Circuit Court in the **Kelley** case, *supra*, was familiar to the residents of the area, the teachers in the school systems and the pupils in the school systems and had been accepted generally by the local populace (R., Maxwell 20b).

Based upon these factors this respondent, the County Board of Education of Davidson County, Tennessee, offered a plan identical with the plan previously offered by the City of Nashville and which had been in operation in the community for a period in excess of three years. The only real modification made by the District Court was to increase the number of grades to start off the plan from the first grade to the first four grades in order that the Davidson County plan might be coextensive in time with the City of Nashville plan.

ARGUMENT.

QUESTION NO. 1.

Whether the petitioners, Henry C. Maxwell, Jr., et al., and deprived of their rights under the Fourteenth Amendment by the approval of a desegregation plan adopted for the public schools in Davidson County and approved by the District Court and the Circuit Court of Appeals, which provides among other things that transfer applications will be given consideration when such transfer is practicable and consistent with sound school administration and when "good cause therefor is shown" and which defines as one of those grounds of "good cause":

> "a. When a white student would otherwise be required to attend a school previously serving colored students only.
>
> b. When a colored student would otherwise be required to attend a school previously serving white students only.
>
> c. When a student would otherwise be required to attend a school where the majority of students in that school, or in his or her grade, are of a different race."

The transfer provisions of the plan approved by the District and Circuit Courts here challenged by the petitioners is identical with the section of the plan approved in the case of **Kelley v. Board of Education of City of Nashville, etc.**, 270 F. 2d 209. We do not feel that any clearer statement of the fallacy of the petitioners' argument could be made than the statement made by the Sixth Circuit Court, speaking through Judge McAllister, commencing at page 228 of that opinion, where the transfer provision is discussed and which, for the Court's convenience, we here quote:

"[6] We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The district court, in the instant case, considered that, in accordance with the reasoning in Briggs v. Elliott, D. C. S. C., 132 F. Supp. 776, 777, the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. In the Briggs case, it was declared, as we have heretofore mentioned, that the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all it has decided is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. 'This,' said the court, as we have previously quoted, on another aspect of this case, 'under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools. * * *' Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. In Cooper v. Aaron, 358 U. S. 1, 17, 78 S. Ct. 1401, 1409, 3 L. Ed. 2d 5, it was said: 'In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this court in the Brown case, can neither be nulli-

fied openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or a feeling that the child's life will be more harmonious with members of his own race. In common justice the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents. The choice, provided in the plan of the Board, is, in law, a free and voluntary choice. It is the denial of the right to attend a nonsegregated school that violates the child's constitutional rights. It is the exclusion of children from such a school that 'generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,' as observed in Brown v. Board of Education, 347 U. S. 483, 494, 74 S. Ct. 686, 691, 98 L. Ed. 873. Such may be the tragic result, when children realize that society is imposing a restriction upon them because of their race or color. The Supreme Court remarked in the foregoing case that the effect of the separation of students because of race was 'well stated' by the district court in the case, then on review, when it declared:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored

children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'

Nevertheless, as stated in Brown v. Board of Education, D. C., 139 F. Supp. 468, 469, 470, subsequent to the decision of the Supreme Court in the prior Brown case:

'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.

'If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.'

[7] While, in the instant case, the parent makes the choice for the small child, that is the only reasonable method, if such a choice may be made. We see no deprivation of right, under the evidence before us. Doubtlessly, fewer Negro children, or their parents, will avail themselves of the transfer provisions, as grade after grade becomes integrated, and more Negro children attend such desegregated schools as time goes on. We are not informed by the record how much such attendance has increased with the additional desegregation that has taken place since the

> hearing. But if it should appear, upon a showing, that there are impediments to the exercise of a free choice, and that a change should be made in the plan to carry out, in good faith, and with every safeguard to the children's rights, the mandate of the Supreme Court, the district court, having retained jurisdiction during the entire period of the process of desegregation under the Board's plan, shall make such modification in its decree as is just and proper. On the record before us, the judgment of the district court does not deprive any of the children of equal protection under the Fourteenth Amendment."

Certainly there is nothing in this record to indicate that there are any impediments to the exercise of a free choice by parents, but as pointed out by the Circuit Court in the **Kelley** case, the District Court has retained jurisdiction during the entire period of the process of desegregation under the plan, and in the event such should appear, the District Court could make such modification as became necessary.

Petitioners rely upon the case of **Boson v. Rippy**, 285 F. 2d 43 (Fifth Cir. 1960). The ultimate result in that case we confess is in conflict with the decision of this Court in the **Kelley** case. A careful reading of the **Boson** case, however, and especially the supplemental opinion in the case, would indicate that the United States Court of Appeals for the Fifth Circuit actually deleted the transfer provision from the plan because such would apply a rule of law to the desegregated public schools from the Dallas School District different from that applicable to other public schools in the State of Texas. That question is not applicable here. On the question of classification according to race, the United States Court of Appeals for the Fifth Circuit said only that:

> "We are so **doubtful** of the validity of the provisions of paragraph 6 that we think they should not be included in the plan."

This doubt seems to have been predicated upon the notation by the three members of the Supreme Court of the United States who thought certiorari should be granted in the **Kelley** case in that the transfer provision constituted "an absolute" ground for transfer of students.

Such a conclusion could result only from a failure to consider the entire plan. Section 4 of the plan as approved by the District Court in both this case and in the **Kelley** case (R., Maxwell 70a), provides only that transfer applications will be **given consideration** when such transfer is practicable and consistent with sound school administration and when "good cause therefor is shown."

Section 5 then defines one of the "good causes" and is the section complained of. This, however, does not make it an "absolute" ground for transfer, but, on the contrary, means that it is a basis or ground which may be given "careful consideration" by the school board and which may be the basis for transfer when such is practicable and consistent with sound school administration.

The **Boson** case further overlooks the fact that while three members of the Supreme Court of the United States desired to grant certiorari on the transfer provision, the majority of the Supreme Court did not desire to grant such certiorari and accordingly certiorari was denied when the identical question was before the Supreme Court of the United States in the case of **Robert W. Kelley et al. v. Board of Education of the City of Nashville**, 361 U. S. 924, 80 S. Ct. 293, 4 L. ed. 2d 240.

QUESTION NO. 2.

Were the petitioners entitled to disrupt the desegregation plan approved by the District Court and by the Circuit Court for the Davidson County school system so as to have exceptions made in their favor?

The effect of petitioners' argument on Question No. 2 is that any plan which does not immediately admit all Negroes who desire to attend desegregated schools is an invalid plan; this for the reason that if the particular petitioners are permitted to attend the school of their choice so would any other parties making application and thus the plan would be destroyed. Such was recognized by the District Court.

No challenge has been made of a year by year plan of desegregation as such. Therefore, we will not attempt to justify the same, although we feel from the evidence adduced and as set forth in the Statement of the Case and as found by the Court, that such a plan was one which complied with the mandate of this Honorable Court for good faith compliance at the earliest practicable date, but recognizing the public interest.

We respectfully submit that unless this Honorable Court in the **Brown** case (**Brown v. Board of Education**, 349 U. S. 294), had recognized the necessity of flexibility in reconciling public and private needs this Court would have entered a decree immediately desegregating all classes in all public schools. On the contrary, this Court, speaking through Mr. Chief Justice Warren, said:

> "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling **public** and **private** needs. These cases call for the exercise of these

traditional attributes of equity power." (Emphasis ours.)

Thus we see that this Honorable Court recognized that some private individuals might not be satisfied with a plan which was adopted for the public good. Such was recognized by the District Court in this case, as it was in the case of **Kelley v. The Board of Education of the City of Nashville, etc.**, which was subsequently approved in 270 F. 2d at 209.

Such was likewise recognized by the Court of Appeals for the Fifth Circuit in the case of **Orleans Parish School Board v. Bush**, Fifth Circuit, 242 F. 2d 156, in the following language:

"... a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the **process** of desegregation as appeared to be helpful in avoiding unseemly confusion and turmoil." (Emphasis ours.)

For the reason set forth in the Statement of the Case, which we will not restate, the Trial Court here found that reasonable time was necessary in the process of the desegregation in order to avoid confusion and turmoil.

Those experienced in education in the City of Nashville and Davidson County recognized that such a plan as was here offered was necessary in order to avoid turmoil and confusion. The only opposing evidence was the theoretical testimony of those individuals who, while they had studied the subject of race relations, had had no direct contact with, and were not familiar with from their own personal experiences, the situation in Davidson County. Either the

plan is a "good faith compliance at the earliest practicable date" and should be approved without exceptions being made which would have the effect of disrupting the plan and destroying it as a plan or in the alternative the plan itself should be rejected by this Court in violation of the very principle which this Court has already established. We submit that it is a good faith compliance when considering problems related to administration, arising from the physical condition of the school plan, the school transportation system, personnel, revision of school districts and attendance areas into compact units, as well as overcoming deep-seated customs of the area, and that an attempt by petitioners to in effect destroy such a plan because of the "private" interest of a few individuals should not be permitted.

The District Court for the Sixth Circuit in the case of **Clemons v. Board of Education of Hillsboro, Ohio**, 228 F. 2d 853, pointed out that "good faith compliance at the earliest practicable date" did not require an immediate transition, regardless of the practical problems involved, and recognized that such practical problems would exist and that the primary responsibility for the solution of the same was with the school authorities.

In view of these cases we feel that the citation to other cases recognizing and approving desegregation on a year by year basis is not necessary. This case has been retained in the District Court, as is proper. In the absence of some change in conditions and circumstances so as to require a change in the order of the District Court and a speeding up of the desegregation plan, frankness requires us to admit that it probably will be that some of the individual petitioners will not attend a desegregated school in the Davidson County system. This would be true in any instance where such a plan is adopted, and as pointed

out in the testimony of the Superintendent of Schools, the school board is the school board of all of the children and all in any given category must be treated alike. It thus results that if the relief sought by the petitioners were granted a plan which has already been found to be workable in the immediate area would in effect be destroyed.

The argument is made that other circuit courts have approved decisions granting individual litigants relief as exceptions to a general desegregation program (Petitioners' Brief, p. 24). Petitioners overlook the very clear distinction between those cases and the case at bar, which was pointed out by Mr. Justice (then Judge) Stewart in the case of **Clemons v. Board of Education**, supra, where the distinction is noted between cases where racial segregation on the part of the school authorities was required or permitted by the state and any change would require the uprooting of a system of education based upon decades of state custom and state law, on the one hand, and cases, such as the **Clemons** case, where segregation had been contrary to the law of the state for almost seventy years. This distinction is clearly set forth in the opinion at page 859 in the following language:

> "In the cases recently decided by the Supreme Court racial segregation on the part of the school authorities was required or permitted by the states involved. The Court recognized in its second opinion in those cases that the transition to an integrated school system in such states would involve many difficult practical problems, varying in each locality, but in each locality requiring the uprooting of a system of education built upon decades of state custom and state law. . . .
>
> By contract the segregation of school children because of their race has been contrary to the law of Ohio for almost seventy years. . . . I think the ap-

pellants were clearly entitled to injunctive relief as a matter of right **in this case**" (Emphasis ours).

Nor do the cases cited by petitioners in their brief require a different conclusion from that rendered by the District Judge. It is true that where the District Court has found that the admission of one or two students to classes not integrated under the plan would not adversely affect the plan, such exercise of discretion and recognition of responsibility by the district judge will not be summarily overruled by the appellate court (See, for example, **Board of Education v. Groves**, Fourth Cir., 261 F. 2d 527). But where there is a reason, as there was here, and as found by the District Judge, that admission of the plaintiffs under an injunction would disrupt the plan, then the District Court has exercised its responsibility to determine whether the plan is reasonable in all its aspects, including the duty of determining whether an exception to the plan in a given case should be made.

CONCLUSION.

The District Court has approved a plan consistent with the mandate of this Court in the **Brown** case; a plan which experience has proven to be workable. The District Court has retained jurisdiction to insure that the plan does work and is not used to deprive any person of a constitutional right. What would appear to be a conflict between the circuits is not in effect a real conflict at all when fully considered, as herein pointed out. The questions sought to be raised by this petition are not of sufficient importance to justify granting of the writ and review of a decision so well considered by both the District and Circuit Courts.

Accordingly respondents respectfully submit that the petition for certiorari should be denied and the school

system of Davidson County permitted to continue its orderly integration under the direct scrutiny of the District Court.

Respectfully submitted,

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No. 217.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

JOSEPHINE OSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

HENRY C. MAXWELL, JR., et al.
Petitioners,

v.

THE COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, et al.

BRIEF

of Board of Education of Knoxville, Tennessee,
In Opposition to the Petition for Writs of Certiorari
to the United States Court of Appeals for
the Sixth Circuit.

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Of Board of Education of Knoxville, Tennessee, In Opposition to the Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

GROUND UPON WHICH THE WRIT SHOULD BE DENIED.

The Court of Appeals, Sixth Circuit, has not rendered a decision in this case in conflict with applicable decisions of the Supreme Court of the United States.

If that proposition be established, then any conflict of decision in this case with that in **Bosco v. Rippy** (C. A. 5), 285 F. 2d 43, should not be ground for reviewing the case. Both cases are concerned with the correct interpretation of this Court's decision in the **Brown** case, 349 U. S. 294 (1955), and if the decision of **Goss v. Board of Education** correctly interprets this Court's opinions, the denial of the petition for writs of certiorari will establish the error of **Bosco v. Rippy** so far as that decision is in conflict. Furthermore, the conflict of **Goss** with **Bosco** is more apparent than real, as hereinafter indicated.

QUESTION PRESENTED.

Whether the decision of the Court of Appeals in this case conflicts with **Brown v. Board of Education**, 347 U. S. 483 (1954), 349 U. S. 294 (1955), in approving a pupil transfer plan which entitles a pupil, either Negro or white, to transfer out of a school theretofore used only by the other race, or having a membership predominantly of the other race, or in which the pupil is placed in a class predominantly of the other race.

ARGUMENT.

The color line is not being illegally drawn when the school board transfers a child upon his voluntary request based upon the true assertion that he will learn better, with less interruption, at the other school. The validity of this as justification for requested transfer is not diminished because it happens that it stems from preponderance of a different race in the school. It could stem from differences in religion, or from personal peculiarities of the child applicant, or any one of many reasons having nothing to do with race.

The plaintiffs have not attacked the new zone map (Exhibit 13, R. Goss, 75a) and must concede that the new zoning is reasonable. Thus the Negroes' segregation, so far as it actually exists under this transfer plan, is due solely to the clustering of their homes in such way that properly determined school zones in which they reside are preponderantly Negro. The process of desegregation in Knoxville will not find communities of Negro and white homes equally and thoroughly mixed together, but typically faces the problem of one race being absent or in a small minority in each community.

If a child is denied disadvantage due to race as a ground for transfer, this goes beyond mere protection of the Negro child's Fourteenth Amendment rights and hobbles the school board in the performance of its duty to educate all pupils the best way it can. In this it cannot avoid dealing with the results of concentration of Negroes in one place and whites in another. When a pupil makes a voluntary application for transfer in the interest of better schooling atmosphere for himself, the board is obligated to help him out.

The transfer of that child, whether white or black, is not in itself a racial denial of another child's application:

and if the latter does make an application which is denied because not reasonably indicative of an improved class room atmosphere and an improved peace of mind in the child, the denial is not a racially discriminatory act, but is simply an act of enforcement of the policy that no transfer shall be granted without good reason.

In **Boson v. Rippy** (C. A. 5, 1960), 285 F. 2d 43, the same transfer provisions here involved were held unconstitutional under this reasoning:

> "Nevertheless, with deference to the views of the Sixth Circuit, it seems to us that classification according to race for purpose of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school."

In the quoted language, the Court has overlooked the voluntary aspect of the application for transfer, as contrasted with the compulsory nature of the assignments to schools under the old system of segregation. The former is the act of the individual; the latter is the act of the state. Only the latter is proscribed.

On the facts of this record there is no conflict with **Boson v. Rippy** for that case recognizes that this transfer plan can be constitutionally applied to relieve the disadvantages or maladjustments due to preponderance of the other race. 285 F. 2d 49. The transfer officer of the Knoxville Board of Education testified thus:

> "Q. Explain in your own words just how this transfer plan will work. A. It will work just exactly, so far as I am concerned, if I am delegated to continue, it will work just exactly like I have done it for 23 years.
>
> "The only difference is now that a Negro child can apply for transfer to a white school where before he

could not, and vice versa. And so far as I am concerned, it will be handled just exactly like it was when he applied for one to his own race.

"Q. I ask you this, Mr. Marable: Say if there is a white child, under the new plan, if there is a white child living in the Eastport School district, which is a Negro school district, on the east side, and wanted to transfer to Park Lowery elementary school, which now is a so-called white district, would he be allowed to do it? A. Well, as I stated a minute ago, he would have that privilege, and if it came to me, it would get serious consideration just exactly the same I have done it before now only I would forget that he was colored and the school was white. It wouldn't be——

"Q. Let's take a Negro child living in the Park Lowry School district which is a white school district and wanted to transfer to Eastport or Green which are Negro school districts. He would be allowed to do it under this plan, would he not? A. The very same way except we would forget he is Negro or a white child. If a white child wants to transfer to Green and applies for a transfer, he will get the same consideration. Only I just forget it is Negro and white."

The opinion upon this subject expressed in **Kelley v. Board of Education**, 270 F. 2d 209, at p. 228 et seq., is entirely sound. We refrain from elaboration, because the pertinent part of that opinion is freely quoted in the reply of the County Board of Education, to the petition for writ of certiorari filed in the companion case of **Maxwell v. County Board of Education of Davidson County**. We fully concur in the arguments of that reply.

CONCLUSION.

The petition should be denied because the decision of the Court of Appeals in the **Goss** case does not conflict with applicable decisions of this Court.

Respectfully submitted,

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REPLY TO BRIEFS IN OPPOSITION TO CERTIORARI

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THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, *et al.*

REPLY TO BRIEFS IN OPPOSITION TO CERTIORARI

Petitioners respectfully direct the attention of the Court to a recent decision which, it is believed, further supports the petitioners' argument that a writ of certiorari should be granted.

On September 17, 1962, the United States Supreme Court of Appeals for the Fourth Circuit decided the case of *Dillard* v. *School Board of the City of Charlottesville, Va.*, 4th Cir. No. 8638. The majority and dissenting opinions in that case are appended hereto.

On September 26, 1962, the Fourth Circuit, sitting *en banc*, entered an order recalling its mandate and temporarily staying it to allow the Charlottesville school authorities to apply for a writ of certiorari and to seek a further stay in this Court. The Court expressly indicated that the stay was intended to continue only until the Supreme Court or a Justice thereof acts upon a further application for a stay. In that order the Court of Appeals for the Fourth Circuit expressly stated its view that the issue involved

should be determined by this Court stating, *inter alia*: "This Court respectfully ventures to suggest that these issues merit review, especially."

As a result of the decision in the *Dillard* case, there is now a conflict between the rulings of the Fourth and Fifth Circuits, on the one hand, and the decision of the Sixth Circuit in the *Goss* and *Maxwell* cases involved in this petition, on the other hand. Furthermore, the *Dillard* decision emphasizes the fact that the issue involved is of widespread public importance and merits plenary review in this Court.

Respectfully submitted,

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APPENDIX

OPINION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8638

DORIS DILLARD, *et al.*,

Appellants,

—v.—

THE SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*,

Appellees,

and

THE SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, VIRGINIA, *et al.*,

Appellants,

—v.—

CAROLYN MARIE DOBSON, *et al.*,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville. John Paul, *District Judge.*

(Reargued July 9, 1962 Decided September 17, 1962.)

Before:

SOBELOFF, *Chief Judge*, and HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL, *Circuit Judges*, sitting *en banc*.

S. W. Tucker (Henry L. Marsh, III, Otto L. Tucker, Jack Greenberg and James M. Nabrit, III, on brief), *for Appellants and Cross-Appellees*, and

John S. Battle, Jr. (Battle, Neal, Harris, Minor & Williams, on brief), *for Appellees and Cross-Appellants*.

Per Curiam:

This appeal was first heard by a panel consisting of Senior Judge Soper, Chief Judge Sobeloff and Circuit Judge Boreman. An opinion was prepared by Judge Soper, but before it was announced by the court a hearing *en banc* was ordered, in which the five active judges of the court sat, but Judge Soper did not participate.

Judge Soper's opinion, which Sobeloff, Boreman and Bell, *JJ.*, adopt as the opinion of the court, is as follows:

Cross-appeals again bring to this court questions arising in the administration of the public schools of Charlottesville, Va., with respect to the assignment of white and Negro children in the elementary and high school grades.* Our most recent decision in *Dodson* v. *School Board of the City of Charlottesville*, 289 F. 2d 439 (1961), outlines the steps that the School Board had then taken toward the integration of the races in the schools and the plan of operation for the school year 1960-1961. The plan involved the division of the City into six geographical districts, each of which was served by one of the elementary schools, to wit: Jefferson, Venable, Johnson, Burnley-Moran, Clark and McGuffey. It was provided that each child should attend the school located in the zone of his residence and

* The opinion of the District Court is reported at 203 F. Supp. 225.

since a large majority of the Negro residents live in the Jefferson District the result was that, with the exception of some 13 Negro pupils attending the predominantly white Venable School, all of the Negro elementary pupils were enrolled in the Jefferson School, which no white pupils attended. No Negro pupils were assigned to the four other elementary schools. The plan, however, provided that the parents of any child, white or colored, could request a transfer and the superintendent of the schools was empowered to grant such a request after consideration of various criteria applicable to white and Negro pupils alike, including factors affecting the immediate interests of the pupils and the efficient administration of the schools.

Two high schools were operated in the City, Lane and Burley. There were no zones for admission to these schools but the superintendent was guided in making assignments of students by the pupil-teacher ratio, convenience of attendance, academic qualifications and, to some degree, by the preference of the pupil and his parents. The transfer provisions were the same as those applicable to the elementary schools.

Prior to the plan for desegregation Lane was all-white and Burley all-colored. In 1960-61, at the time the *Dodson* case was brought, thirteen Negro elementary pupils had been assigned to Venable and seven Negro high school students had been assigned to Lane. That suit was instituted on behalf of four Negro pupils whose application for admission to white elementary schools had been denied because they resided in the Jefferson district and also on behalf of six Negro high school pupils whose application for admission to Lane had been denied, four because of academic deficiency and two because they resided nearer to Burley than to Lane. Having been denied relief in the District Court the plaintiffs appealed to this Court. We upheld the Board's plan but condemned the Board's ap-

plication of the plan as discriminatory and unconstitutional. We pointed out that all Negro elementary pupils were initially assigned to Jefferson whatever the zone of their residence but white pupils living in Jefferson were initially assigned to white schools in other districts. In respect to high schools we showed that all colored pupils were initially assigned to Burley and all white pupils to Lane and that Negro pupils desiring to transfer to Lane were subjected to residence and academic tests which were not applied to white students seeking admission to Lane. We recognized that these practices were discriminatory but, upon the assurance of the Board that they were transitory, we remanded the case to the District Court to reexamine the situation with regard to the ensuing school year, 1961-1962, "confident that steps [would] be taken promptly to end the present discriminatory practices in the administration of the desegregation plan", 289 F. 2d 444.

Mindful of this admonition the School Board made certain changes in its plan of operation. The assignment of each elementary school pupil, white or colored, was made to the school in his residence zone. This step, of course, tended to perpetuate the earlier practice of segregation; but transfers were permitted in the following fashion. Elementary pupils, white or colored, assigned to schools where they were in the racial minority were permitted with the consent of their parents to transfer to a school in another district where they would be in the racial majority. Thus a white child living in the Jefferson colored district could transfer to a school in one of the five white districts and a colored child living in one of the white districts could transfer to Jefferson. To effectuate this plan a form letter was sent by the Superintendent of the schools to the parents of each child attending an elementary school outside the zone of his residence stating that the child had been tentatively reas-

signed to the same school, but that the child could remain in that school only if the parents specifically requested it. A form to be signed by parents was attached to the letter.

Through this procedure all of the white pupils, 149 in number, who lived in the Jefferson area were granted "transfers" to schools in the other zones and approximately 50 Negro elementary school pupils residing in the white districts were "transferred" to Jefferson. Nine addtiional Negro pupils were admitted to the Venable elementary school, bringing the total number in attendance to twenty and nine additional Negro high school pupils were admitted to Lane, bringing the total to sixteen.

The School Board reached the conclusion that by adopting this plan they had eliminated all racial discrimination and, accordingly, they rejected the applications for transfer to other districts of seventeen Negro elementary pupils residing in the Jefferson district. On their benalf the present suit was brought in the District Court to restrain the actions of the Board but the District Judge held that the plan was valid and this appeal followed.

The question for decision is of especial importance in the administration of the Charlottesville schools in view of the Board's past operations and its present attitude in the administration of the school system. When it is noted that despite prolonged litigation all of the Negro elementary school pupils in the City, other than the twenty assigned to Venable, are still enrolled at the all-Negro Jefferson school, while all of the white students attend one of the five elementary schools in the other districts, and that all of the Negro high school students except sixteen attend the all-Negro Burley High School, it is clear that little change has been made in the administration of the elementary schools from that which prevailed when the schools were completely segregated. It seems equally clear that

little progress in the integration of the schools may be expected if the Board is permitted to pursue the policy which, after mature consideration, it has deliberately adopted.

The Board's argument is that there is no racial discrimination in the enrollment of the pupils in the elementary schools for the following reasons. The Board has abandoned the plan contained in our decision in the *Dodson* case. Under that plan Negro pupils wherever they lived were initially assigned to Jefferson and white students were initially assigned to the school of the zone of their residence; and since transfers were only sparingly permitted the admission of colored pupils into white schools was effectually prohibited and segregation was prolonged. Under the new 1961-1962 plan, says the Board, every child whether white or Negro is initially assigned to the school of his residence district and transfers are granted to white and colored children under the same rule or restriction. Any child may transfer from a school in which his race is in the minority to a school in which his race is in the majority and since this plan applies to both races alike there is no discrimination.

In support of its position the Board relies on *Kelley* v. *Board of Education of the City of Nashville*, 6 Cir., 270 F. 2d 209,* where it was held that a transfer provision is not invalid which permits voluntary transfers of white and Negro students who would otherwise be required to attend schools previously serving only members of the other race, or where the majority of the students are of the other race. The Court thought that this plan was not invalid since the Supreme Court in *Brown* v. *Board of Education*,

* Certiorari was denied in this case, 361 U. S. 925, three justices indicating that they would grant the petition limited to the question whether certain provisions of the Nashville plan were invalid for the reason that they "explicitly recognized race as an absolute ground for the transfer of students between schools, thereby perpetuating rather than limiting racial discrimination."

347 U. S. 483, did not deprive persons of the right of choosing the school they desired to attend but merely held that a person may not be denied the right to the school of his choice because of his race. The Sixth Circuit, however, in its subsequent decision in *Goss* v. *Board of Education of the City of Knoxville, Tenn.*, 301 F. 2d 164 (1962), observed that the application of this transfer provision may become a violation of constitutional rights and consequently admonished the Board not to use it as a means of perpetuating segregation. And see *Maxwell* v. *County Board of Education of Davidson Co., Tenn.*, 301 F. 2d 828, 6 Cir., 1962. Moreover, the Fifth Circuit in *Boson* v. *Rippy*, 285 F. 2d 43, differing from the views set out in the *Kelley* case, disapproved a desegregation plan which included a transfer provision like that practiced in Charlottesville. It held, 285 F. 2d 48, that "classification according to race for purposes of transfer is hardly less unconstitutional than such classification for purposes of original assignment to a public school." In *Mapp* v. *School Board of Chattanooga*, D. C. E. D. Tenn. 1962, 203 F. Supp. 843, 853, the District Court, in accord with *Boson* v. *Rippy*, *supra*, said that "any transfer plan, the express or primary purpose of which is to prevent or delay the adoption or implementation of the plan of desegregation herein developed, should not be approved."

In our view the Charlottesville plan in respect to the pupils in the elementary schools is clearly invalid despite the defense that the rules for the assignment and transfer of pupils are literally applied to both races alike. It is of no significance that all children, regardless of race, are first assigned to the schools in their residential zone and all are permitted to transfer if the assignment requires the child to attend the school where his race is in the minority, if the purpose and effect of the arrangement is to retard integration and retain the segregation of the races. That

this purpose and this effect are inherent in the plan can hardly be denied. The School Board is well aware that most of the Negro pupils in Charlottesville reside in the Jefferson zone and that under the operation of the plan white children resident therein will be transferred as a matter of course to the schools in the other zones while the colored children in the Jefferson zone will be denied this privilege. The seeming equality of the language is delusive, the actual effect of the rule is unequal and discriminatory. It may well be, as the evidence in this case indicates that some Negroes as well as whites prefer the schools in which their race predominates; but the wishes of both races can be given effect so far as is practicable not by restricting the right of transfer but by a system which eliminates restrictions on the right, such as has been conspicuously successful in Baltimore and in Louisville.

It was suggested during the argument of the appeal that a reversal of the judgment of the District Court might lead the Board to deny all transfers in the Charlottesville schools. We take this occasion to say, however, that such a step might well be as obnoxious as that employed by the Board in the case at bar. A similar plan was condemned in *Taylor* v. *Board of Education of New Rochelle*, 2 Cir., 294 F. 2d 36.

We do not mean to say that the School Board has no discretion in the assignment of pupils to the Charlottesville schools, but in respect to the elementary children in this case the Board has applied no criteria that would stand the constitutional test and, therefore, in the interest of these children further delay in the exercise of their constitutional rights cannot reasonably be granted.*

* The operation of the Charlottesville schools was brought to our attention in 1956 in *School Board of the City of Charlottesville* v. *Allen*, 240 F. 2d 59.

We, therefore, hold that as to the seventeen elementary children, who were plaintiffs in the court below, the judgment be reversed and the case remanded to the District Court so that appropriate steps, by injunction or otherwise, may be taken to secure their admission to the schools of their choice for the 1962-1963 school year.

The cross-appeal by the School Board in this case relates to the judgment of the District Court that nine Negro high school pupils who were excluded by the Board from the Lane High School be admitted to that institution. Subsequently, the Board admitted two of the nine and as to them the cross-appeal is expressly abandoned in the Board's brief in this Court. Four of the remaining seven were before this Court in the *Dodson* case, where we noted that they had been excluded from Lane for academic deficiency and said that residence and academic tests may be properly applied in passing on the applications for admission to a school provided that the factors of race and color are not considered, 239 F. 2d 439, 442. Since it was shown that the tests were not applied to white children in the same situation we held that the four plaintiffs had been discriminated against. Nevertheless, we affirmed the judgment below in the confident belief that discrimination between the races in the admission of high school students would be eliminated by the Board itself. In this respect our hopes have been disappointed. The Board has abandoned the residence tests as to high school children but has made no change in the academic tests. The four Negro high school pupils who were before us in the *Dodson* case, and in addition three other high school students, all of whom are cross-appellees in this case, have been denied admission to Lane because of alleged academic deficiency. The Board's position is that their admission into a school for which they are not qualified will not only be detrimental to them but to the school itself and, therefore, they should be

excluded. Obviously, these factors are worthy of consideration in the operation of any school system. The difficulty is, however, that the Board admits white children to Lane without tests, irrespective of their academic qualification, upon the theory that they should not be denied any high school education whatsoever. The alternative of sending them to Burley is not deemed worthy of consideration. The discrimination involved is too clear to require discussion. Not only are academic tests applied to Negroes only but Negroes who are considered so deficient in academic achievement that their admission to Lane would be detrimental to the school, are sent to Burley without regard to the consequences. See *Bush* v. *Orleans Parish School Board*, E. D. La., New Orleans Div., —— F. Supp. ——, decided April 3, 1962.

Accordingly, the judgment of the District Court regarding the admission of the nine high school students to the Lane High School will be affirmed and the case will be remanded to that Court in order that appropriate steps may be taken to put the judgment into effect.

Reversed in part and affirmed in part and remanded for further proceedings. Let the mandate issue immediately.

ALBERT V. BRYAN, *Circuit Judge*, with whom HAYNSWORTH, *Circuit Judge*, joins, dissenting:

Without semblance or hint of gerrymandering—so conceded by the appellants—school districts were laid out by the Charlottesville School Board for elementary classes in a plan of desegregation which had been filed at the instance of the District Court: each child regardless of race is assigned to the school in the district of his residence. Then, any pupil is allowed—by merely a telephone call—to transfer from any school in which his race is not in the majority. Yet this arrangement is now stricken down by

the Court because in the operation of the transfer feature as to one school—Jefferson—there can be no transfer of a Negro student from that school inasmuch as it is predominantly Negro. This is said to be discrimination. I think the conclusion erroneous both in fact and in law.

I. It is not discrimination in fact because the same right of transfer as the white children have at Jefferson is accorded colored children in schools that are mostly "white". The same restriction of the Negroes at Jefferson is applied to the white children in the other schools. The Negroes may transfer from the latter—and 50 of them did—whereas no white student can leave those schools. It is argued that the white children would not desire to leave a "white" school but the Negro would want to leave Jefferson, and thus he is deprived, because of his color, of the "right" to attend an integrated school. This is to argue, also, that by leaving Jefferson School the white children create segregation there. With equal reason it may be argued that the colored children in departing from the other schools caused segregation there. All of these contentions wrongly ignore three vital considerations: the fairness of the entirety of the plan; the Fourteenth Amendment does not guarantee a student an integrated school to attend; and the "segregation" here is not the result of the plan but of individual choices of individual students.

The Negro was not placed at Jefferson because he was a Negro, nor was the white child enrolled at another school because he was white. Neither was so placed in order to keep them apart. They are in their respective schools solely because of the location of their respective residences and for no other reason. The Jefferson residence district, to repeat, was not arbitrarily formed.

Approval of the plan of the Charlottesville Board has been declared by this Court. In *Dodson v. School Board*, 289 F. 2d 439 (4 Cir. 1961) we said of it, at p. 442:

> "At the elementary school level, the plan contemplates that every child, regardless of race, shall be sent initially to the school of the district in which he lives, and after such initial assignments, there may be transfers if the parents so request and the superintendent approves. *This is a perfectly acceptable method of making school assignments*, as long as the granting of transfers is not done on a racially discriminatory basis or to continue indefinitely an unlawful segregated school system . . ."

The only criticism of the plan there made was the initial assignment of all Negro elementary pupils in the city to Jefferson, rather than to the school of their residence. This was corrected. So that now the only objection urged is that the Negro student does not have freedom to move out of Jefferson when that is the school of his residence.

The Sixth Circuit approved an equivalent of the Charlottesville transfer provision in *Kelley* v. *Board of Education*, 270 F. 2d 209, 228 (6 Cir. 1950) *cert. denied* 361 U. S. 924, and more recently in *Goss* v. *Board of Education*, 301 F. 2d 164, 168 (6 Cir. 1962) and *Maxwell* v. *County Board of Education*, 301 F. 2d 828, 829 (6 Cir. 1962). Contra: *Boson* v. *Rippey*, 285 F. 2d 43, 47 (5 Cir. 1960); but see *Rippy* v. *Borders*, 250 F. 2d 690, 693 (5 Cir. 1957) *post* p. 4. *Taylor* v. *Board of Education*, 294 F. 2d 36 (2 Cir. 1961) *cert. denied* 368 U. S. 940, decided by a divided court is not authority to sustain the Court here. There a suburban New York City school district had been deliberately drawn so as to encompass Negro residents only.

II. In law there has been no discrimination, for the Negro child has not been denied any privilege through policy, usage, law or regulation. If there has been a deprivation, it is—solely, actually and not capriciously—the result of the geographical location of his residence. This

is a consideration understandably overlooked by the Court in the generality of its statement that the infrequency of Negro attendance in "white" schools is itself proof of discrimination.

Jefferson School District, as previously noted, was not a discriminatory division. It came about, as often occurs in many cities, through the Negroes' living in a concentrated area. This may change, and thereafter alter the play of the residence and transfer rule at Jefferson. But until then the residents of the area must abide by rules and regulations based on just and fair district lines. No constitutional or legal question is presented. No Government authority has allocated them to a special section of the city or centered their population in a specific territory.

The fundamental reason of the Court for holding the refusal of transfer of Negroes to the Jefferson District to be discrimination seems to be that the refusal deprives the Negro children of association with white children, all of whom have transferred from Jefferson District. There is no other grievance suggested in their remaining at Jefferson. The Court further manifests this reason when it says that the residence and transfer provision retards "integration".

But even if this is the result of the Charlottesville plan—although entirely incidental—nevertheless it would not be a violation of the doctrine of *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and subsequent commentary decisions. The Supreme Court was explicit there in not requiring integration, but in merely striking down denial of rights through segregation. The point was sharply made in *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C. 1955). It is too late now to question this as the plain holding of that three-judge court. Judge Parker, a member of that panel, confirmed this meaning when he spoke for this Court in *School Board of Charlottesville* v. *Allen*,

240 F. 2d 59, 62 (4 Cir. 1956) *cert. denied* 353 U. S. 911, and again in *School Board of City of Newport News* v. *Atkins*, 246 F. 2d 325, 327 (1957). Substantially this very statement was approved with emphasis by the Fifth Circuit in *Rippy* v. *Borders*, 250 F. 2d 690, 693 (1957). Furthermore, on remand of *Brown* v. *Board of Education*, the District Court from which it originated, following the rescript of the Supreme Court immediately after its *second* and implementing school decision, *Brown* v. *Board of Education*, 349 U. S. 294 (1955), stated the proposition with equal clarity as follows:

> "Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> "If it is a fact, as we understand it, with respect to Buchanan School that the district is inhabited by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

Brown v. *Board of Education*, 139 F. Supp. 468, 470 (D. Kan. 1955). Like decisions in other Circuits are cited in the dissent in the Second Circuit (N. Y.) case of *Taylor* v. *Board of Education, supra*, 294 F. 2d at 47, n. 4.

Our Court's opinion now seems to hold that if a racial minority in a school zone is given a right to transfer out, every member of the racial majority in that school must be given the same right—otherwise the rule is unconstitutional. Applied to Jefferson School the opinion intimates that the Negro pupils there—the great majority of the student body—should be permitted to transfer in the same way as the minority. But the Court denied this very right to the majority in *McCoy* v. *Greensboro Board of Education*, 283

F. 2d 667 (4 Cir. 1960). There the Board granted the requests of Negro children to enter a "white" school, then afterwards allowed the transfer of the majority—all white children—to another school. The transfer of the majority was held invalid because it left a minority composed of Negroes only. This again was apparently on the thesis that it resulted in a separation of the races whereas the law requires integration—a theory I find untenable.

III. The transfer rule is simply a means of permitting a child to express his wishes. Surely, to allow a child such an option—even though his wishes be based on racial grounds—is not unconstitutional. Allowing expression by both races so far as practicable—with equal opportunity—of their preferences in a personal matter has not in any degree been precluded by the Supreme Court in its efforts to solve the school problem or in any other field. The Court has merely ruled against enforced separation of persons of different races by reference to objective criteria. Never has the Court denied the exercise of the personal tastes of the races in their associations.

The judgment of the District Court in respect to the elementary school appellants should be affirmed. In regard to the high school appellants I express no disagreement with the majority.

HAYNSWORTH, *Circuit Judge*, with whom BRYAN, *Circuit Judge*, joins, dissenting:

I agree with my brother, Bryan, and I join him in his opinion.

I am prompted to turn to other considerations, however, for it seems to me the two opinions are on an esoteric plane far above practical problems confronting school boards. Practical, difficult problems do arise in many places

as school boards undertake the task of conversion of school systems to a basis of operation which counters social customs and patterns of conduct, which, over a period of centuries, have become deeply ingrained in a people: The Supreme Court in 1955 recognized that such problems would be encountered and directed that they be not ignored.[1] School boards were allotted the duty of solving and overcoming those problems with all deliberate speed, while the lower federal courts were required to enter appropriate orders when school boards neglect their duty. It is not for the courts, however, by overlooking the practical problems, to impose difficulties in the way of a school board struggling, even though with some reluctance, to achieve the goal that has been set for it.

As I approach the practical situation, in terms of which I think the legal issue here should be framed, I do so with awareness that the case has not been presented on that basis. The question whether discrimination inheres in a geographic assignment plan, if accompanied by a provision for permissive minority transfers, has been tendered in general and abstract terms.[2] The Court answers it in those terms.[3] The School Board has sought affirmance of

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[1] Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083.

[2] The question tendered, in effect, is this: If A and B, one of whom is Caucasian and the other Negro, each of whom is a member of a racial minority in the school to which he is assigned, are both allowed to transfer, is there a denial of the equal protection of the laws to X, if X and Y, a Negro and a Caucasian, each of whom is a member of a racial majority in the school to which he is assigned, are both denied transfers? Since the conundrum elides the fact, or the possibility that it may be the fact, that there was good reason for allowing the transfers of A and B and no comparable reason for allowing the transfer of either X or Y, the resultant discussion, interesting though it may be, is esoteric abstraction.

[3] The majority concentrates attention upon A and X, both of whom had been assigned to the same school. That concentration does not make the resulting discussion concrete, for the opinion

the District Court's approval of its plan on the basis of its belief that the plan, generally and abstractly, is not discriminatory. It has not asked that it be approved as a reasonable amelioration of a particular problem during a transitional period. That it asked for more, however, does not mean it should get less than its due. If its plan merits temporary approval as a transitional measure, its disapproval should not be unqualified.

One may thus concede the reasonableness of the abstract principle declared by the majority and reasonably hold the view that the majority should have proceeded further to consider whether the plan, with its determined defects and shortcomings, might not be permissible as a temporary expedient. If the present record is insufficient for that purpose, it could be supplemented upon remand. At least, the implication that the abstract principle will be applied in other cases, no matter how compelling the reasons for the school board's adoption of a similar plan, ought not to be left open.

Those conversant with the problems of desegregation in the South, know the intensity of public concern over the plight of children constituting a small minority unwillingly assigned to a school in which an overwhelming majority is of the other race. If separation of Negro children "solely

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does not consider their disparate circumstances or the bearing of those circumstances upon the reasonableness of a general rule allowing the permissive transfer of the one, but not of the other.

The majority also points to the fact that the Board's plan permits actual mixing of the races in the schools at a slower rate than might occur under some other plan, not adopted by the School Board. Such a fact may bear more or less heavily upon the reasonableness of a particular plan under particular circumstances, but, of itself and without regard to other facts bearing upon the reasonableness of the Board's conduct, it is not a final answer. The same thing may be said of every interim arrangement which has met the approval of the courts. Indeed, the same thing may be said of a geographic assignment plan unaccompanied by any provision for permissive minority transfers.

because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,"[4] such a child may be subjected to a much more searing experience if, bereft of established friends and relations, compelled to attend a school or classes in which all others are of the opposite race. Some children could adjust themselves to such a situation, but in the early stages of desegregation when the force of old customs and practices is unspent, many could not. Those who could not adjust to such a radical change would likely have senses of inferiority greatly intensified, and unadjusted children too frequently become the butt at the hands of their fellows of those unrestrained cruelities of which children of all races are capable. If such unadjustable children are compelled to remain in an intolerable situation, the damage to their emotional and mental development and well-being will be irreparable.

It is because of such widespread concern over the plight of unwilling minorities in particular schools that school boards throughout the South have adopted permissive transfer provisions in association with assignment plans based upon attendance areas or other objective criteria. In some places, such a provision may be essential to the institution or continuance of a plan of desegregation, for it touches an area of peculiar public sensitivity, and school boards cannot operate public school systems without public support.

Provisions for permissive minority transfers are founded upon an assumption that the transition to a fully desegregated school system will create personal problems for unwilling minorities in particular schools, especially when the minority is relatively small, which differ in kind and degree from the problems which majorities, especially rela-

[4] Brown v. Board of Education, 347 U. S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873.

tively large majorities, may be expected to encounter. The assumption seems plainly valid, for it hardly is to be doubted that a child well adjusted in school A where his race predominates, where he has established friendships and where he ardently wishes to be, may become very maladjusted if compelled to attend school B where his own race is a small minority, where he has no established friends and where racial differences may become greatly magnified in his own mind. Such a problem is obviously more acute and more difficult to overcome than any personal problem which may be anticipated by members of racial majorities, unseparated from established friends, compelled to accommodate themselves to the presence or absence of a minority of pupils of the other race.

Of course, the magnitude of the personal problems and of the difficulties in the way of requisite adjustments will vary with individuals and with differences in environmental conditions. A child who might encounter insurmountable difficulty, as a member of a small minority, in making the personal adjustment, might encounter little difficulty if the minority group was relatively large, 49%, for instance,[5] and included others who were his old friends. Such variances, however, do not militate against the general validity of the assumption that, in the transitional period, unwilling members of minority groups will encounter difficulties and problems which are different in kind and degree from those which members of majority groups may be expected to encounter.

This kind of problem exists whatever the race of the minority group. That present provision for permissive minority transfers is in the interest of Negro minorities is suggested by the extent to which they avail themselves of it. This very record discloses that fifty Negro pupils availed themselves of the permissive right to transfer to

[5] Of course, that is not this case.

Jefferson School, rather than attend the predominantly white schools in the attendance areas of which they resided.

The majority, of course, does not hold that unwilling minorities may not be allowed to transfer. It does hold that if such transfers are allowed as of course, the same right of transfer must be extended to every other child regardless of the dissimilarities of his circumstances. The provision for minority transfers is treated as a virus which so infects an otherwise objective, nondiscriminatory, lawful, geographic assignment plan, that the plan may not be enforced as to anyone. Provision for protection of the special interest of minorities is related to malice, which, naked and alone, is not unlawful, but which makes unlawful and actionable a communication which otherwise would be privileged and unactionable.

The necessary result of the opinion, therefore, is a stricture on provision for permissive transfers of protesting members of minority groups whenever a school board finds it necessary or desirable to adopt or continue an enforceable geographic assignment plan. The consequence will be that the discretion of school boards is circumscribed, and, in some instances, the effective adoption of any plan may be made impossible.

I do not understand the court to say that, in the absence of a blanket provision for the transfer of unwilling members of minority groups, a transfer of one such child, for good reason, would deprive the school board of its power of enforcement of all other assignments. It certainly should not. School boards always have had, and always should have, discretionary power to treat exceptional cases as exceptional. If a school board, having adopted a geographic assignment plan without a minority transfer provision, was confronted with proof that a particular child had previously attended a segregated school attended solely by members of his own race where he worked well and was well adjusted,

but, assigned under the plan as one member of a small minority to another school predominantly populated by pupils of the other race, had encountered insurmountable difficulty, that his progress had been arrested and he was suffering great emotional and mental harm, and if such proof was accompanied by the urgent plea of the child and his parents that he be transferred back to the school he formerly attended, must the school board ignore the plea or suffer loss of its power to control all other assignments which it had made under its geographic assignment plan? I would say, obviously not.[6] Every exception to a general rule, if made with good reason, does not invalidate the rule. A permissive transfer of a child whose personal need makes a transfer requisite, should not confer upon all other pupils, who have no comparable need, the same transfer privilege. If tutorial assistance is furnished the child who needs it most, every other pupil, who has no such need, is not denied the equal protection of the laws if he is not offered the same assistance. It would be a gross perversion of constitutional doctrine to say that any governmental body may not reasonably classify citizens and their claims or that a classification based upon the need of the claimants is necessarily unreasonable.[7]

If this be so, if a transfer of one child in dire need of it as an exception to an otherwise lawful, geographic assignment plan does not divest the school board of its authority to deny transfers to those who show no such need, a general provision for permissive transfers of the needy

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[6] If a member of a racial majority has comparable need of a transfer, I think a school board could and should transfer him and that its doing so would not deprive it of the power to deny transfers to other members of the majority assigned by attendance areas, who have no comparable need.

[7] If this be not so, the conclusion cannot be premised upon anything to be found in the Constitution of the United States.

class must be permissible if the actual and special need of those to whom it applies reasonably warrants it. The existence of such need and its relationship to the rule, the majority does not consider. The court does not reach the question whether the provision, as an interim measure and as applied here, is reasonable, wise or even essential to progress. It concludes that the provision, however reasonable, in combination with the assignment plan is abstractly discriminatory, and there it stops.

If that were the stopping place, no "stair-step" plan of desegregation would ever have been approved. Such plans are not just abstractly discriminatory, inevitably in application they are concretely so. They are approved, nonetheless, when they represent reasonable progress toward ultimate compliance. Other such interim measures, though claiming no pristine purity free of discrimination's taint, are similarly approved. Indeed that is the very thing the Supreme Court required of us by its remand order in the School Cases. During this transitional period, we have no right to strike down what Charlottesville's School Board has done or to overturn its authority over assignments and transfers, unless, after full consideration, it is found that what it has done is unreasonable in the light of all of the circumstances.*

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* Of course, this determination is initially for the District Judge, whose findings we can overturn only within the traditional rules limiting our appellate power. Here there is no clear finding on the decisive fact of reasonableness or unreasonableness, for the District Court was of the opinion that the plan was not discriminatory, even abstractly. A remand for further consideration of the crucial question of reasonableness of the rule in the light of the needs and the differences in the needs of members of disproportionate minority and majority groups, might be appropriate. We should not undertake a final decision of that factual question; at least, we should not decide it without consideration of it.

Since it seems to me the court has not reached the crucial question and that its abstraction is not decisive of the whole case, I have found it necessary separately to record my disagreement with the result.

Judge Bryan authorizes me to note that he joins in this dissent.

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FILED
DEC 26

IN THE

Supreme Court of the United States

October Term, 1962

No. 217

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Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF

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PETITIONERS' BRIEF

Opinions Below

1. *Goss* case. The memorandum opinion of the United States District Court for the Eastern District of Tennessee (R. 119) is reported at 186 F. Supp. 559. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 157) is reported in 301 F. 2d 164 (6th Cir. 1962).

2. *Maxwell* case. The first Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Middle District of Tennessee (R. 228) is reported at 203 F. Supp. 768. The second Findings of Fact, Conclusions of Law and Judgment of that court (R. 269) is unreported. The opinion of the United States Court of Ap-

peals for the Sixth Circuit (R. 282) is reported in 301 F. 2d 828 (6th Cir. 1962).

Jurisdiction

The judgment of the Court of Appeals in the *Goss* case was entered on April 3, 1962 (R. 156). The judgment of the Court of Appeals in the *Maxwell* case was entered on April 4, 1962 (R. 281). The petition for certiorari was filed June 29, 1962, and was granted October 8, 1962, limited to Question 1 presented by the petition. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (*Goss* case), and Davidson County, Tennessee (*Maxwell* case), are deprived of rights under the Fourteenth Amendment by judicial approval of a provision in desegregation plans adopted by their local school boards, which expressly recognizes race as a ground for transfer between schools in circumstances where such transfers operate to preserve the pre-existing racially segregated system, and which operate to restrict Negroes living in the zones of all-Negro schools to such schools while permitting white children in such areas to transfer to other schools solely on the basis of race.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement

These two cases involve the desegregation of the public schools of the City of Knoxville, Tennessee, and of Davidson County, Tennessee, an area adjacent to the City of Nashville.

The cases were brought by Negro public school pupils and their parents as class actions under Rule 23(a)(3), F. R. C. P., against the local school authorities seeking injunctive and declaratory relief to obtain desegregation in accordance with *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294.[1] In each case, jurisdiction of the District Court was invoked pursuant to 28 U. S. C., §§ 1331, 1343, 2201 and 2202, and 42 U. S. C., §§ 1981 and 1983, the cases involving alleged denials of rights under the Fourteenth Amendment. In both cases the school authorities acknowledged by their answers that they were continuing to operate racially segregated public school systems. After directions from the trial courts to present desegregation plans (R. 29, 208), both boards adopted plans to desegregate one school grade each year over a twelve year period, beginning with the first grade, in 1960 in Knoxville and in 1961 in Davidson County. (For text of plans see: R. 30, 214.) While there were differences in wording, the two plans were substantially the same. Both contained provisions for rezoning of schools without reference to race, and for a system of transfers.

The transfer rule, which is at issue on this petition, provided that pupils could obtain transfers from the schools in their zones of residence to other schools upon request in certain cases. The Knoxville plan provided:

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[1] The *Goss* case was filed December 11, 1959 in the District Court for the Eastern District of Tennessee (R. 5). *Maxwell* was filed September 19, 1960 in the Middle District of Tennessee (R. 165).

6. The following will be regarded as some of conditions to support requests for transfer:

   a. When a white student would otherwise be required to attend a school previously serving colored students only;

   b. When a colored student would otherwise be required to attend a school previously serving white students only;

   c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different rate (R. 31-32).

The transfer rule adopted by Davidson County was the same except for one or two words not affecting the meaning, e.g., in the introductory clause the words "valid conditions for requesting transfer" are used instead of "valid conditions to support requests for transfer" as in the *Goss* case (R. 214-215). Both plans also contained similar general language that transfers would be granted when "good cause" is shown.[2]

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[2] The Knoxville Plan provided (R. 31):

"5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration."

The Davidson County Plan provided (R. 214):

"4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration."

Plaintiffs filed written objections to both plans including specific objections to the above-quoted transfer rule (R. 32-34, 215-219). The District Courts in both cases held hearings to consider the adequacy of the plans at which the parties presented evidence.

In the *Goss* case, the District Court found the plan acceptable and approved it in all respects, except that it required the school board to re-study and re-submit a plan relating to an all-white vocational school offering technical courses not available to Negro students. On plaintiffs' appeal to the Sixth Circuit in the *Goss* case, the Court of Appeals modified this judgment "insofar as it approved the board's plan for continued segregation of all grades not reached by its grade a year plan," and remanded, instructing the District Court "to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation" (301 F. 2d at 169). Thus, the Court sustained one of plaintiffs' arguments saying the "evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision" (301 F. 2d at 167). The court affirmed the approval of the plan as to the other features, including the transfer provision, stating that this approval was "subject to it being used for proper school administrative purposes and not for perpetuation of segregation" (301 F. 2d at 168).

In the *Maxwell* case the District Court disapproved the school board's twelve year plan and modified it to require that the first four grades be desegregated as of January 1, 1961, with an additional grade to be desegregated each September thereafter until all grades were covered. The District Court approved the racial transfer provision and also refused injunctive relief to several plaintiffs who sought admission to white schools nearer their homes as

exceptions to the plan in higher grades that were still segregated. On plaintiffs' appeal involving these last mentioned two issues, the Sixth Circuit affirmed the approval of the transfer plan and the denial of injunctive relief as to three plaintiffs who sought individual admissions.

Evidence and Holdings:

***Goss* Case**

The major part of the testimony in the record relates to the issue presented by the request for a twelve year delay in desegregation, and since no review of the Sixth Circuit's action on this matter is sought, this factual summary is limited to matters bearing on the transfer plan. The evidence touching on the transfer plan consisted of testimony by school board members as to its meaning, their understanding of its likely effect, and the reasons for the plan. There was also testimony by a school administrator as to prior transfer procedures, and several affidavits and exhibits were filed by plaintiffs in support of their motion for new trial which reflect school board action establishing transfer procedures after the trial court's approval of the plan.

The school board president, Dr. Burkhart, testified that the provision for transfers based on race was adopted out of concern for "the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstance which might be harmful" (R. 85); that the board thought it might be "harmful" to a certain number of white students to go to school with Negroes and also "it might be harmful to some of the colored students to go with white students

if they did not want to" (R. 85). He said the basis for this feeling was:

> The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways, and certainly not in school ways. And there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either one of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur (R. 86).

The witness stated that he did not necessarily refer to physical harm but was more concerned with "mental harm" (R. 86). With regard to the expected operation of the transfer rule, the school board president testified that he did not know the mechanics as to how pupils would be notified of their new school zones (R. 91-92). He further testified:

> Q I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively? A. We doubt that they will.
>
> Q. As a matter of fact, none have remained in the City of Nashville, have they? A. I don't know. All I can do to keep up with the City of Knoxville.
>
> Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not? A. Yes, sir.
>
> Q. And if he applied for transfer out of his zone to a school which had been formerly serving white students only, then his application would be denied under

this plan, would it not, sir? A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.

* * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of this plan? A. Yes, sir (R. 93-94).

Another board member, Dr. Moffett, acknowledged that the transfer provisions "at least give the opportunity" to perpetuate segregation insofar as they are availed of by the students or parents (R. 108).

Mr. Marable, a school administrator in charge of handling transfer requests, stated that under the system used before this plan was approved, when parents request transfers he investigates the requests and gets the views of the principals concerned and determines if the family has a "valid reason" (R. 115); that the school board "leaves that up to me," (*Ibid.*); that he did not know what the board's written rules on transfer provided (R. 115-116); that "I just know I have handled it so many years on my own, and so far I haven't stuck my neck out on it" (R. 116); "that each case is individual. That has to be handled that way. Could not have a rule" (R. 116); that an example of a "valid" reason would be where a child's mother taught at a school and wanted the child with her because she had nowhere to leave it and the school had room and the principal agreed (R. 116-117); that generally transfers were granted for "hardship cases and convenience" (R. 117).

After the trial court approved the plan, the school board adopted a resolution providing for administration of the

provisions as follows: "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended" (R. 141).

The District Court opinion did not discuss the transfer plan issue in its memorandum opinion, although during the trial the court indicated that it regarded itself as bound by the Sixth Circuit's prior approval of an almost identical provision in the Nashville, Tennessee school case (R. 94). See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209, 228 (6th Cir. 1959).

The Court of Appeals' holding with respect to the transfer plan in the *Goss* case was as follows (R. 162):

> The transfer feature of the plan comes under sharp criticism of the plaintiffs. They claim that the operation of such a plan will perpetuate segregation. We do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. It is in the same category as the pupil assignment laws. They are not inherently unconstitutional. Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372, D. C. N. D. Ala., affirmed, 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. They may serve as an aid to proper school administration. A similar transfer plan was approved by this Court in Kelley v. Board of Education of City of Nashville, 270 F. 2d 209, C. A. 6, cert. denied, 361 U. S. 924, 80 S. Ct. 293, 4 L. Ed. 2d 240. We adhere to our former ruling with the admonition to the board that it cannot use this as a means to perpetuate segregation. In Boson v. Rippy, supra, the court said, 285 F. 2d at p. 46, the transfer feature "should be stricken because its provisions recognize race as an absolute ground for the transfer of students,

and its application *might* tend to perpetuate racial discrimination." (Emphasis added.) This transfer provision functions only on request and rests with the students or their parents and not with the board. The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands (301 F. 2d 164, 168).

***Maxwell* Case**

With regard to the transfer plan, the Superintendent of Schools agreed that the effect of the rule is to permit a child or his parents "to choose segregation outside his zone but not to choose integration outside of his zone" (R. 219); that the provision was identical to that in the Nashville plan (*Ibid.*); and that as it operated in Nashville and was intended to operate in Davidson County, white pupils were not actually required to first go to the Negro schools in their zones and then seek transfers out, and no Negro pupils who did not affirmatively seek a transfer to an integrated school were assigned to one (R. 219-220).

Dr. Eugene Weinstein, a professor at Vanderbilt University in Nashville, testified about a survey of the attitudes of Negro parents in Nashville who had a choice of whether to send their children to desegregated schools. He indicated that the most frequent factor influencing those who did not send their children to white schools was an unwillingness to separate several children in a family where they had older children not eligible for desegregation under the grade a year plan (R. 222-223). He said the experience in Nashville indicated "mass paper transfers of Whites back into what is historically the White school, of Negroes remaining in what is historically the Negro school"; and that the transfer provisions tend to keep the system oriented

toward a segregated system with token desegregation (R. 226).

Six of the plaintiffs in this case reside nearer to all-Negro schools than to white schools (R. 230 Finding No. 5).

At a further hearing held January 10, 1961, on plaintiffs' motions following the initial approval of the plan with modifications, the evidence indicated that under the new zones adopted under the plan, in the first four grades, there were 288 white children in the Negro school zones and 405 Negro children in the zones of the white schools (R. 252). The school authorities sent notices to the parents of these children asking them to indicate within three days whether they requested permission for the children to stay at the school presently attended or requested permission for a "transfer" to the newly zoned school (R. 247-250). Of this group, only fifty-one pupils, all of them Negroes, asked to attend the school in the new zones (R. 265).

As previously indicated the District Court approved the transfer feature of the plan (R. 242). On appeal the Sixth Circuit also approved this provision on the authority of its decision in *Goss* (301 F. 2d at 829). (R. 284).

Argument

This case presents issues of the constitutionality of substantially identical provisions in desegregation plans adopted by two public school boards in response to directions that they present plans to comply with *Brown* v. *Board of Education*, 347 U. S. 483 and 349 U. S. 294. In the second *Brown* decision the Court directed District Courts "to consider the adequacy of any plans" which school authorities might propose "to effectuate a transition to a racially nondiscriminatory school system" (349 U. S. at 301). Subsequently, in *Cooper* v. *Aaron*, 358 U. S. 1, the

Court unanimously reaffirmed *Brown*, stating that state authorities were "duty bound to devote every effort toward initiating desegregation and bring about the elimination of racial discrimination in the public school system" (358 U. S. at 7).

The plans for desegregation in the cases at bar provide for gradual transition on a grade-by-grade basis for a new system for determining the initial placement of pupils. Under the plans, this is to be accomplished by a geographic method of placing pupils according to residence in desegregated school zones or attendance areas to be determined without reference to race. (See R. 31, ¶¶ 3 and 4 of Knoxville plan and R. 214, ¶¶ 2 and 3 of Davidson County plan.) This plan to change the prior pattern of separate overlapping zones for Negroes and whites is, at least, on its face, consistent with *Brown* which envisioned "revision of school district and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis" (349 U. S. at 300-301).[3] However, the challenged racial transfer provisions of the plans, which become effective at the same time the new zoning program goes into effect on a grade-by-grade basis,[4]

[3] Numerous appellate decisions following *Brown* have condemned the practice which still lingers in many areas of maintaining separate school zones for Negro and white pupils. See, e.g., *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72, 76 (4th Cir. 1960); *Marsh* v. *County School Board of Roanoke County, Va.*, 305 F. 2d 94, 96 (4th Cir. 1962); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118, 124 (4th Cir. 1962); *Northcross* v. *Bd. of Education of City of Memphis*, 302 F. 2d 819, 823 (6th Cir. 1962); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 498 (5th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, not yet reported (4th Cir., No. 8643, Oct. 12, 1962); cf. *Norwood* v. *Tucker*, 287 F. 2d 798 (8th Cir. 1961).

[4] The racial transfer provision thus is effective only in the grades "desegregated" under the grade-a-year program, and not in grades which remain under the old program of compulsory segregation by separate racial zones.

operate to continue race as a factor in placing pupils in schools, albeit on a partially optional basis. The racial transfer rule continues a policy of racial discrimination in the assignment of pupils to schools and to the extent that it is used, necessarily works to preserve the racially segregated pattern of schools previously created by state law.[5]

The racial transfer rule (R. 31-32, 214-215) provides that pupils be permitted upon written request to secure transfers from the schools which they would be required to attend under the nonracial zoning plan to other schools. The eligibility of a student to obtain such a transfer is cast in terms of race.

(1) A white student, *qua* white student, can transfer from "a school previously serving colored students only";

(2) a colored student, *qua* colored student, can transfer from "a school previously serving white students only";

(3) any student can transfer from a school "where the majority of students of that school or in his or her grade are of a different race."

Thus the transfer rule is explicitly racial, providing for transfers on the basis of a difference between the race of a transfer applicant and either the race of the pupils whom a school *previously* served, the race of a majority of the

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[5] School segregation was required in Tennessee by the Constitution of 1870, art. 11, sec. 12 and by Tennessee Code of 1955, §§49-3701 to 49-3703. (See text at R. 14-15). The Tennessee Supreme Court held the provisions invalid following *Brown* v. *Board of Education*, *supra*, in *Roy* v. *Brittain*, 297 S. W. 2d 72 (Tenn. 1956).

pupils in the school, or the race of a majority of the students in the transfer applicant's grade level in a given school.*

These transfers on the basis of racial factors operate only in one direction, e.g., toward placing students in schools that formerly served their own race exclusively or schools or classes that have a majority of pupils of their own race. This is the source of the transfer provision's invariable tendency to promote racial separation in schools and of its racially discriminatory impact upon individual pupils. No transfer is granted under this provision which will have the effect of increasing desegregation; every transfer necessarily will have the effect of increasing the size of the majority race group in the schools to and from which pupils are transferred.

The discrimination effected by the provision is equally plain. Under the plan a white child living in the zone of a "Negro school" (i.e., a formerly all-Negro school, or predominantly Negro school, or a school with a Negro majority in the applicant's grade) is given the option of transferring to a "white school." But the plan makes no provision for a Negro child living in the same zone to transfer out to a white school; he must remain in the Negro school. It is a very evident and obvious violation of equal protection to deny a choice to one pupil and grant it to another student similarly situated except for race.

Proponents of the racial transfer rule point to the fact that the plan effects a correlative disparity in treatment based on race in white school zones (where Negro pupils can transfer out, but white pupils cannot), in an attempt to justify the discriminatory denial of transfers to Negroes

* It should be realized that the concept of pupils being *initially assigned* on a nonracial basis and then *transferred* on a racial basis is largely fictitious. In practice, pupils simply choose a school on the basis of race before going to any school (R. 141, 219-220).

living in Negro school areas. It is argued that equal protection is afforded by the plan since some whites are also denied transfers because of their race, and thus there are reciprocal discriminations based on race. Actually, this symmetrical inequality of treatment based on race is familiarly characteristic of racial segregation rules.[7]

Of more relevance is the fact that the racial discriminations in both the Negro and white zones operate to limit desegregation rather than to advance it. Neither a Negro nor a white child is granted a racial transfer to extend desegregation, but either child can obtain one if it will operate to decrease or prevent desegregation.

But, the theory that the correlative discriminations against Negroes and whites in some way "balance" each other does more than merely defy the homily that "two wrongs do not make a right." More fundamentally, it ignores the important constitutional principle that Fourteenth Amendment rights are personal rights.[8] This Court

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[7] After all, a bus segregation law forbids whites from sitting with Negroes or in the back of a bus, just as it forbids Negroes from sitting with whites in the front. But cf. *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd 352 U. S. 903.

[8] Paradoxically, defenders of school segregation have frequently taken the opposite tack and argued that the personal nature of Negro pupil's rights plus certain statutory administrative remedies limited the relief that a court could grant in school desegregation cases to ruling on the admissions of individual pupils while leaving generally applicable racial assignment policies beyond the reach of the courts. It is submitted that these arguments have been properly rejected since Negro children's right to education in a nonsegregated school system can be protected only by removing racially discriminatory rules which apply to all members of the racial group segregated by state authorities. See, for example, *Branson* v. *Board of Trustees of School District No. 1 of Clarendon County, S. C.*, 4th Cir., No. 8727, December 7, 1962 (reversing an order dismissing as to all plaintiffs but the first one named in the complaint); *Wheeler* v. *Durham City Board of Education*, 4th Cir. No. 8643, decided October 12, 1962 (re-

emphasized this in rejecting an argument that a racial restrictive covenant on land enforced against Negroes was valid since state courts would enforce similar covenants against white occupancy, in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. [Footnote citing McCabe v. Atchison, T. & S. F. R. Co., 235 U. S. 151, 161; Missouri ex rel. Gaines v. Canada, 305 U. S. 337; Oyama v. California, 332 U. S. 633.] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also, *Brown* v. *Board of Education*, 349 U. S. 294, 300; *Sweatt* v. *Painter*, 339 U. S. 629, 635; *Sipuel* v. *Board of Regents*, 332 U. S. 631, 633, treating the rights involved here as personal.

The appellate decisions which have dealt directly with the issue presented here are *Boson* v. *Rippy*, 285 F. 2d 43, 47 (5th Cir. 1960) and *Dillard* v. *School Board of City of Charlottesville, Va.*, not yet reported (4th Cir., No. 8638, decided Sept. 17, 1962), which held the racial transfer plan

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versing a trial court which had denied all relief on the ground that plaintiffs "simply want nothing more or less than a general order of desegregation"); *Jackson* v. *School Board of City of Lynchburg*, 201 F. Supp. 620, 625-629 (W. D. Va. 1962) (rejecting such an argument), rev'd in part on other grounds, not yet reported (4th Cir., No. 8722, Sept. 28, 1962). See also *Green* v. *School Board of City of Roanoke, Va.*, 304 F. 2d 118, 124 (4th Cir. 1962).

invalid, and the three decisions of the Sixth Circuit which upheld the transfer system, e.g., *Kelley* v. *Board of Education*, 270 F. 2d 209, 228 (6th Cir. 1959), and the two cases now being reviewed, *Goss* v. *Board of Education*, 301 F. 2d 164, 168 (6th Cir. 1962), and *Maxwell* v. *County Board of Education*, 301 F. 2d 828, 829 (6th Cir. 1962).[9]

The decision in *Boson* v. *Rippy*, *supra*, emphasized that the plan embodied racial classifications for transfer which the court deemed "hardly less unconstitutional than such classification for purposes of original assignment to a public school" (285 F. 2d 48). In the *Dillard* case, *supra*, the majority held the racial transfer device invalid stating that "the purpose and effect of the arrangement is to retard integration and retain the segregation of the races" and that this "can hardly be denied." The Court ordered 17 Negro pupils admitted to a white school outside their zone of residence since white pupils in the zone were granted such transfers.

In *Kelley* v. *Board of Education*, 270 F. 2d 209, 228 (6th Cir. 1959), the Sixth Circuit upheld the racial transfer provision as it did in the cases at bar. The Court in *Kelley* held that it was permissible to allow a parent to "voluntarily choose a school where only one race attends" (270 F. 2d at 229), but did not discuss the fact that the option to transfer was conferred and denied on the basis of race or the

[9] Among District Court opinions dealing with the issue are *Mapp* v. *Board of Education of City of Chattanooga, Tenn.*, 203 F. Supp. 843, 853 (E. D. Tenn. 1962), appeal pending (transfer plan held invalid on authority of *Boson* v. *Rippy*, *supra*; the court declined to follow *Kelley* v. *Board of Education* stating that the primary purpose of the transfer rule was to prevent or delay desegregation); *Jackson* v. *School Board of the City of Lynchburg, Va.*, 203 F. Supp. 701, 704-706 (W. D. Va. 1962), appeal pending (transfer rule held valid); *Thompson* v. *County School Board of Arlington County*, 204 F. Supp. 620, 625-626 (E. D. Va. 1962), appeal pending (transfer plan held valid; injunction dissolved).

asserted tendency of the rule to preserve segregation. The Court remanded leaving open to plaintiffs only the right to show that there were "impediments to the exercise of a free choice" (270 F. 2d at 230). The *Kelley* decision relied primarily upon *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C. 1955), which is discussed in detail in the footnote below.[10]

In the *Goss* opinion (301 F. 2d at 168; R. 162-163), the Sixth Circuit adhered to the result reached in *Kelley, supra*, but attempted to qualify its approval of the plan by stating that while it was "not inherently unconstitutional" it might be unconstitutional as applied and that it was approved "'subject to it being used for proper school administration purposes and not for the perpetuation of segregation" (301 F. 2d at 168; R. 163). The Court in *Goss* also attempted to distinguish *Boson* v. *Rippy, supra*, by mentioning that the transfer rule functioned only upon the request of students or parents and not the school board, and that supervision might safely be left in the hands of the trial judge who retained jurisdiction. Petitioners submit that there is no distinction at all since both factors obtained in *Boson* v. *Rippy* as well.

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[10] *Briggs* v. *Elliott*, 132 F. Supp. 776 (E. D. S. C. 1955), was an opinion rendered by a three-judge court that considered this case (which was one of those consolidated with *Brown* v. *Board of Education, supra*), on remand following this Court's decision in May 1955. The opinion was announced from the bench at the beginning of the hearing as the form of an order to be entered in accord with this Court's mandate. No issue relating to any specific proposal or plan for desegregation was before the Court. The *Briggs* opinion attempts to state what this Court did not decide in *Brown*, and stressed that court's view as to the legality of "voluntary segregation," though in general terms and without any attempt to define what would constitute "voluntary segregation." Certainly, nothing in *Briggs* could undercut this Court's unanimous declaration in *Cooper* v. *Aaron*, 358 U. S. 1, 7, that school officials are "duty bound to devote every effort toward initiating desegregation."

Beyond this, the court's seeming qualification of its approval of the plan is illusory since it did not indicate under what conditions it would ever consider racial transfers improper. Nor is it evident how the trial court's retention of jurisdiction is thought to afford any safeguard since no standards for judging the application of the plan are provided. Moreover, there is no hint in the record that the transfer provision was ever considered by the Court of the parties as a temporary transitional device. Indeed, if it had been so proffered at trial, the Court of Appeals, as a matter of consistency, should have rejected it as inadequate on the same ground the grade-a-year feature was rejected, i.e., that the defendants had not sustained their burden of establishing that the plan was consistent with good faith compliance at the earliest practicable date by evidence of legitimate obstacles to desegregation as contemplated by *Brown* v. *Board of Education*, 349 U. S. 294, 300-301 (301 F. 2d at 166-167; R. 158-162).

There are, of course, further compelling reasons why the racial transfer is inappropriate even as an interim device. It does not suppress racial discriminations or "preclude their revival" (Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188 (1944)); rather, it continues racial discrimination in a slightly different form. It bears no rational relationship to solving any school administrative problem relevant to the proper granting of delay in desegregation. Indeed, it is more likely to aggravate administrative problems by disturbing the efficacy of school zones in properly distributing pupils among schools in relation to capacity. Certainly it encourages, and, indeed, renders more plausible, an effort to manipulate school zone lines on a racial basis. This is true since in a given school zone established on the basis of student population and school capacity, if sufficient numbers of pupils of a minority race are

transferred out, the authorities will be justified in expanding the school zone to include more members of the majority race (who cannot transfer out) in order to fully utilize the available space in the school. That this is a real and not a highly suppositious possibility is amply demonstrated by the New Rochelle, New York school system where this sequence of events occurred. See *Taylor* v. *Board of Education of the City of New Rochelle*, 191 F. Supp. 181, 184-185 (S. D. N. Y. 1961), appeal dismissed 288 F. 2d 600 (2nd Cir. 1961); 195 F. Supp. 231 (S. D. N. Y. 1961), aff'd 294 F. 2d 36 (2nd Cir. 1961), cert. den., 368 U. S. 940.

Indeed, in the *Taylor* case, *supra*, the Court went beyond condemning a practice like that here. It held that where school officials had once permitted white children to transfer out of a Negro school zone but abandoned this practice in 1949, and had manipulated school zone lines on a racial basis, the school board was still under a duty to afford Negro pupils in the school zone thus created an opportunity to transfer to other schools.

Furthermore, the Sixth Circuit's comparison of this racial transfer rule with pupil assignment laws, e.g., as in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (N. D. Ala. 1958), aff'd on limited grounds, 358 U. S. 101, and *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956), is not at all apt, for the pupil placement laws conspicuously did *not* maintain race as a factor for determining transfers. The clearest holdings that racial considerations may not be used in determining either pupil transfers or initial placements may be found in various cases involving improper application of pupil placement laws. See, for example, *Norwood* v. *Tucker*, 287 F. 2d 798 (8th Cir. 1961); *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir. 1962); *Marsh* v. *School Board of*

Roanoke County, 305 F. 2d 94 (4th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, not yet reported (4th Cir., No. 8643, Oct. 12, 1962).

The use of racial factors to determine school assignments has not and cannot be justified as reasonably related to any legitimate governmental objectives. The classification of school buildings on the basis of the race of the pupils formerly occupying them is truly bizarre. Professor Charles Black has observed that: "A small proportion of Negro 'blood' puts one in the inferior race for segregation purposes; this is the way in which one deals with a taint, such as a carcinogene in cranberries."[11] By the racial transfer rule the "taint" has been transferred to buildings, rendering even a *formerly* all Negro school so unfit for white children as to justify the special provision. This serves no legitimate state purpose.

The racial majority rule is similarly unrelated to any proper governmental objective. It is passionately defended by some as the means of protecting a sole tiny child from disastrous imaginary personal consequences upon being thrust unwilling, as the lone member of his race, into a hostile class, when actually the provision permits transfers by pupils in any school or class where there is not a providential exact mathematical equality between the number of pupils of each race. The school authorities have argued that the provision is necessary to protect pupils in a small minority from maladjustments or emotional harm upon being placed in a hostile environment. No such blanket racial rule as this is needed to provide transfers for truly maladjusted children, if transfers are indicated, and the school authorities have an inherent and unchallenged power to grant transfers based on individual hardships and other

[11] Black, "The Lawfulness of the Segregation Decisions," 69 Yale L. J. 421, 426 (1960).

educationally acceptable standards unrelated to preservation of the segregation system.

This Court held in *Bolling* v. *Sharpe*, 347 U. S. 497, that "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." The Court went on to find segregation in public education to be "not reasonably related to any proper governmental objective" and a deprivation of liberty in violation of due process. Plaintiffs respectfully submit that the racial classifications made by the school authorities in this case are equally unconstitutional and that the defendants should be required to institute a truly nonracial system of determining the placement and admission of pupils in schools.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments of the court below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 217

JOSEPHINE GOSS, ET AL., PETITIONERS

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.

HENRY C. MAXWELL, JR., ET AL., PETITIONERS

v.

COUNTY BOARD OF EDUCATION OF DAVIDSON COUNTY, TENNESSEE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Goss* (R. 157–164) is reported at 301 F. 2d 164. The opinion of the United States District Court for the Eastern District of Tennessee (R. 119–137) is reported at 186 F. Supp. 559.

The opinion of the United States District Court for the Sixth Circuit in *Maxwell* (R. 282–284) is reported at 301 F. 2d 828. The first findings of fact, conclusions of law, and judgment of the United States District Court for the Middle District of Tennessee (R. 228–243) are reported at 203 F. Supp. 768. The second findings of fact, conclusions of law, and judgment (R. 269–273) are not reported.

JURISDICTION

The judgment of the court of appeals in the *Goss* case was entered on April 3, 1962 (R. 156–157). The judgment of the court of appeals in the *Maxwell* case was entered on April 4, 1962 (R. 281). The petitions for writs of certiorari were granted by this Court on October 8, 1962, limited to the first question presented by the petition (371 U.S. 811; R. 285). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the transfer provisions in the plans of school desegregation approved by the courts below, which provide for automatic transfer solely on grounds of race out of the integrated school to which a pupil is assigned on the basis of residence back to his former segregated school, invalidates those plans as remedies for the denial of petitioners' rights under the equal protection clause of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The instant cases are the first school desegregation cases that this Court has agreed to review on plenary

hearing since *Cooper* v. *Aaron*, 358 U.S. 1. They present a significant question regarding the permissible means to effectuate school desegregation. The question is also one about which lower federal courts have disagreed. Compare the views of the Sixth Circuit expressed in *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209, certiorari denied, 361 U.S. 924, and the opinions below, with the holdings of the Fourth and Fifth Circuits in *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920, and *Boson* v. *Rippy*, 285 F. 2d 43.[1]

It is now over eight years since this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, when state authorities became "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." *Cooper* v. *Aaron*, 358 U.S. 1, 7. As a consequence, 255,367 of the 3,279,431 Negroes of school age living in the southern and border states and the District of Columbia—representing 7.8 percent—have come to attend biracial schools.[2] To some, this represents great progress in bringing about

[1] Two district courts have also refused to approve desegregation plans containing transfer provisions similar to those involved in this case. See *Mapp* v. *Board of Education of City of Chattanooga*, 203 F. Supp. 843 (E.D. Tenn.); *Vick* v. *County Board of Education of Obion County*, 205 F. Supp. 436 (W.D. Tenn.).

[2] 243,150 of these Negroes (95.2 percent) live in Delaware, District of Columbia, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia. See *Statistical Summary of School Segregation-desegregation in the Southern and Border States*, p. 3, published by the Southern Education Reporting Service (November 1962).

changes in deep-rooted social patterns; to others, the pace has been too slow. The realization of the rights enunciated by this Court in *Brown* v. *Board of Education*, is of extreme importance to millions of American citizens, and the attainment of a nation-wide system of non-discriminatory public education with the least disturbance or other interference with public education is of vital interest to the country as a whole.

The United States has participated in the two previous cases in this Court involving school desegregation problems. We believe that in these cases, because of the nature of the issue presented and the disagreement of the lower courts, it is again incumbent upon the United States to express its views.

STATEMENT

These actions were initiated by Negro pupils and their parents to desegregate the public schools in Knoxville, Tennessee, and Davidson County, Tennessee (an area adjacent to the City of Nashville.)[3] Both suits were brought as class actions under Rule 23(a)(3), F.R. Civil P., against the local school authorities seeking injunctive and declaratory relief to obtain desegregation in accordance with *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294.[4] In each case the jurisdiction of the district court was invoked pursuant to 28 U.S.C. 1331, 1343, 2201, and 2202 and rights

[3] The *Goss* case was filed on December 11, 1959, in the District Court for the Eastern District of Tennessee (R. 5). The *Maxwell* case was filed on September 19, 1960, in the District Court for the Middle District of Tennessee (R. 165).

[4] As early as August 17, 1955, the Knoxville School Board recognized that it was required to take steps to implement the

were asserted under 42 U.S.C. 1981 and 1983 (R. 5–6, 171–172).[5] In both cases, the school authorities acknowledged by their answers that they were continuing to operate racially segregated public school systems (R. 27, 202).[6] After directions from the trial courts to present desegregation plans (R. 29, 208), both boards

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Brown decision. Various study groups were formed and eventually eight possible plans of desegregation were presented to the school board. At a meeting on May 11, 1956, the school board announced that the plans had been studied but all had been rejected because it "did not feel at that time that desegregation of the Knoxville Public Schools could be successfully put into operation" (R. 43–46, 122–123).

It does not appear that the Davidson County School Board took any steps to implement the *Brown* decision prior to the institution of this suit (R. 190, 202, 204).

[5] In the *Maxwell* case, the plaintiffs also attacked the assignment of school personnel on the basis of race and requested that any desegregation plan provide for the assignment of teachers, principals, and other school personnel on a non-racial basis (R. 174–175, 184).

[6] The answer of the defendants in *Goss* said (R. 27): "It is therefore stated to this Court that the said defendants do not for one moment admit to any dereliction of duty on their, or their predecessors' part in not having hastened to obey the Supreme Court's pronouncement. Two duties of these defendants have sharply clashed, the one to obey the Constitution of the United States as so recently interpreted, the second to honor and respect an allegiance to our community and its members which incorporates in its very fabric a careful protection of our cherished institutions. More particularly, there is the absolute compulsion to seek ever for efficient, undisturbed and continuous schooling, unmarred by the possibility of interruption from drastic unpopular change. The defendants have simply discharged the responsibilities of their offices in the only way that a proper reconciliation of conflicting allegiances has permitted. The defendants owe no apologies to anyone, and make none."

adopted plans to desegregate one school grade each year over a twelve-year period beginning with the first grade in 1960 in Knoxville and in 1961 in Davidson County (R. 30; 214). While there were differences in wording, the two plans were substantially the same. Both contained provisions for rezoning of schools without reference to race, and for a system of transfers.

The transfer rule, which is at issue in this case, provides that, in certain instances, pupils may obtain transfers from the schools in their zones of residence to other schools. The Knoxville plan, which is essentially the same as the Davidson County plan, provides (R. 31–32):

> 6. The following will be regarded as some of the valid conditions to support requests for transfer:
>
> a. When a white student would otherwise be required to attend a school previously serving colored students only:
>
> b. When a colored student would otherwise be required to attend a school previously serving white students only:
>
> c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race.

Both plans also contain general provisions stating that transfers will be granted when "good cause" is shown.[7]

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[7] The Knoxville Plan provides (R. 31):

"5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given

Petitioners filed in the respective district courts written objections to both plans including specific objections to the above quoted transfer rule (R. 32–34, 215–219).[8] In each case the district court held a hearing to consider the adequacy of the plan.

The Evidence and Lower Court Holdings in the Goss Case.[9]—Dr. Burkhart, the president of the Knoxville school board, testified that the transfer provision was intended to provide for "hardship circumstances" (R. 85). When asked, "* * * this feeling of the board that there should be provision for transfers based on race—this is attributable to the board's feel-

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full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration."

The Davidson County Plan provides (R. 214):

"4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration."

[8] The objection in the *Goss* case was as follows (R. 34): "Paragraph six (6) of the plan violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that said paragraph provides racial factors as valid conditions to support requests for transfer, and further in that the racial factors therein provided are manifestly designed and necessarily operates to perpetuate racial segregation."

[9] The record mainly relates to the adequacy of the twelve-year plan of desegregation, but, since this matter is not here under review, our statement of facts is limited to matters bearing on the transfer plans.

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ing with regard to the hostility of the community to this sort of change; is that it?," he answered (R. 85):

> Not as much as to the effect that it might have upon the students. I would like to be clear on the matter that our primary concern is the education of our students, all of them. This is our prime concern.
>
> Other factors enter into our decision, but our primary concern is the orderly education of our students, both white and colored, in an effort to make available to the community the best facilities and instructional facilities that we can under the least possible circumstances which might be harmful.

Dr. Burkhart explained that the board thought it might be "harmful" to a certain number of white students to go to school with Negroes and also "it might be harmful to some of the colored students to go with white students if they didn't want to" (R. 85). He said the basis for this feeling was (R. 86):

> The fact that we are talking about two separate races of people, with different physical characteristics, who have not in our community been very closely associated in many ways and certainly not in school ways. And there would be a sudden throwing together of these two races which are not accustomed to that sort of thing. Either of them might suffer from it unless we took some steps to try to decrease that amount of suffering or that contact which might lead to that in case it did occur.

He stated that he did not necessarily refer to physical harm but was more concerned with "mental harm."

Dr. Burkhart testified that he did not know pre-

cisely what procedure would be used to notify students of their new school zones (R. 91–92), but he did indicate how he expected the transfer plan would operate (R. 93–94):

> Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively?
>
> A. We doubt that they will.
>
> Q. As a matter of fact, none have remained in the City of Nashville, have they?[10]
>
> A. I don't know. * * *
>
> Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not?
>
> A. Yes, sir.

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[10] The Knoxville and Davidson County transfer provisions were copied from the Nashville desegregation plan (R. 219). The experience under the Nashville plan is summarized in Report of the United States Commission on Civil Rights, *Civil Rights U.S.A./Public Schools Southern States 1962*, pp. 115–116: "After 3 years of desegregation, only 13 percent of the Negroes eligible to attend white schools were doing so. No exact figures are available for the 1961–62 year, but school officials estimate the percentage is appreciably higher—perhaps 20 percent. After 3 years, there were no whites in Negro zones attending a Negro school. Last year, there were only the two attending the Negro Pearl Elementary School. There have been no recent figures compiled on the number of whites originally assigned to Negro schools, but when desegregation began in 1957 there were 55, all in the first grade. Projecting this known figure to five grades, the total number would have been 275 in 1961–62."

Q. And if he applied for transfer out of his zone to a school which has been formerly serving white students only, then his application would be denied under this plan, would it not, sir?

A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.

* * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of this plan?

A. Yes, sir."[11]

Mr. Marable, a school administrator in charge of handling transfer requests, described the system used before the plan involved in this case was adopted (R. 112). He said that transfer requests were evaluated on a case by case basis, no specific rules were followed, he was vested with great discretion, and generally transfers were granted for "hardship cases and convenience" (R. 112–117).

The district court, with one modification, approved the Knoxville desegregation plan, but did not discuss the transfer provisions in its memorandum opinion

[11] School board member Ray also acknowledged that the operation of the transfer provision would tend to perpetuate segregation (R. 104). Another board member, Dr. Moffett, stated that the transfer provisions "[a]t least give the opportunity" to perpetuate segregation as they are availed of by students or parents (R. 108).

(R. 119).[12] During the trial, the court indicated that it regarded itself as bound by the Sixth Circuit's prior approval of an almost identical provision in the Nashville, Tennessee, school case (*Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209, 228, certiorari denied, 361 U.S. 924) (R. 94).

After the district court's decision, the school board adopted a resolution providing for administration of the transfer provision as follows: "All first grade pupils should either enroll in the elementary school within their new school zone or in the school which they would have previously attended" (R. 141).[13] This procedure avoided assigning students to schools within their new zones and then requiring them affirmatively to seek a transfer if they desired to take advantage of the transfer provisions of the plan. Rather, students were given the option to enroll in the school previously attended, *i.e.*, the segregated school (R. 145, 151). Petitioners, claiming that this administrative device further demonstrated that the transfer plan would perpetuate segregation, moved for a new trial (R. 138–155).[14] The motion was denied by the district court (R. 155).

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[12] The district court approved the Knoxville desegregation plan in all respects except that it required the school board to re-study and resubmit a plan relating to an all-white vocational school offering technical courses not available to Negro students.

[13] As of January 22, 1960, 78 percent of the students in Knoxville were white and 22 percent were Negro. There were 30 white schools and 10 Negro (R. 260). The record does not indicate which of these schools were elementary schools and which were high schools.

[14] Petitioners alleged that (R. 154): "(b) Under the plan, as elucidated by the procedure established in said policy, pupils will be assigned routinely to said Negro and white schools ac-

The court of appeals approved the transfer provision (R. 162; 301 F. 2d at 168).[15]

The Evidence and Lower Court Holdings in the Maxwell case.—J. E. Moss, the Superintendent of Schools of Davidson County, testified that the effect of the transfer provisions of the Davidson County desegregation plan was to permit a child or his parents "to choose segregation outside of his zone but not to choose integration outside of his zone"; that the provision was identical to that in the Nashville plan; and that as it operated in Nashville and was intended to operate in Davidson County, white pupils were not actually required to go first to the Negro schools in their zones and then seek transfers out, and no Negro pupils who did not affirmatively seek a transfer to an integrated school were assigned to one (R. 219–220).

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cording to race, as in the past, without regard to non-racial school zones and without regard to a transfer procedure in which the pupil affirmatively seeks a transfer from his school in the non-racial zone to another school. (c) Said policy manifestly is designed to impede pupils' free choice to attend a school in their zone, and is designed to influence students or parents to remain in segregated schools, in that it readopts, as a part of defendant's official assignment policy under and pursuant to the plan, defendants' past policy of assigning pupils to racially designated schools."

[15] The court modified the district court's judgment "insofar as it approved the board's plan for continued segregation of all grades not reached by its grade-a-year plan," and remanded, instructing the district court "to require the board to promptly submit an amended and realistic plan for the acceleration of desegregation" (R. 163–164; 301 F. 2d at 169). On June 25, 1962, the Knoxville School Board voted to double the rate of desegration by opening two grades a year instead of one. See Report of the United States Commission on Civil Rights, *Civil Rights U.S.A./Public Schools Southern States 1962*, p. 130.

Another witness, Dr. Eugene Weinstein, a professor at Vanderbilt University in Nashville, testified that the experience in Nashville was "mass paper transfers of whites back into what is historically the white school, of Negroes remaining in what is historically the Negro school," and that the transfer provisions tend to keep the system oriented toward a segregated system with token desegregation (R. 226).

The district court, while modifying some aspects of the desegregation plan submitted by the school board, approved the transfer provisions of the plan (R. 242).[16] As in the *Goss* case, additional proceedings were held in the district court after petitioners moved for further relief to object to the manner in which the transfer provisions were being administered (R. 244). The evidence showed that, as a result of the rezoning, 288 white children were in zones of the 7 elementary schools that were previously all Negro and 405 Negro children were in zones of the 62 elementary schools that previously were all white (R. 194, 252).[17] The

[16] The court modified the school board's twelve-year plan to require that the first four grades be desegregated as of January 1, 1961, with an additional grade to be desegregated each September thereafter until all grades were covered (R. 240–242). The court also refused injunctive relief to several plaintiffs in higher grades that were still segregated who sought admission to white schools nearer their homes as exceptions to the plan (R. 241–242, 269–270). With respect to petitioners' request that the school board eliminate segregated teacher and personnel assignments, the court reserved judgment (R. 241–242).

[17] As of September 1960, 95 percent of the students in Davidson County were white and 5 percent were Negroes. There were 62 white elementary schools, 16 white high schools, 7 Negro elementary schools, and one Negro high school (R. 194).

school authorities sent notices to the parents of these 693 students asking them to indicate within three days whether they requested permission for the children to stay at the school previously attended (*i.e.*, the segregated school) or requested permission for a "transfer" to the newly zoned school (R. 247–250).[18] Petitioners contended that these notices were misleading and encouraged the continued maintenance of racial segregation in that assignments were actually to a segregated school from which there must be a transfer out (R. 245). The district court held that the notices were adequate and unobjectionable.[19]

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[18] Of this group, only fifty-one pupils, all of them Negroes, asked to attend the school in the new zones (R. 265).

[19] In its second findings of fact, conclusions of law, and judgment the court considered further the question of teacher assignment on a racial basis. The court indicated that it did not believe that this issue had been finally settled by the *Brown* case but recognized that serious problems were presented under the equal protection clause of the Fourteenth Amendment (R. 271): "Particularly is this true when the Court considers the fact that a plan has been approved for Davidson County which includes a very liberal transfer provision. When this provision, although it is on a voluntary basis, is coupled with a policy (and the Court is not now finding that the policy exists in Davidson County) which would assign teachers on the basis of race, then a serious question is presented to the Court as to whether there is not actually being thereby perpetuated the very condition which the Supreme Court said could not be perpetuated, and this is a segregated system of public schools * * *. The Court finds that it is not necessary to determine the question relative to the assignment of school teachers and other personnel at this time for the reason that the Court does not believe (even if it should now hold and declare that the plaintiffs do have the right to attend a school system where race is not one of the factors considered in the assignment of teachers) that an injunction should issue at this time." The court stated that the plaintiffs could renew this question at a later date (R. 272).

On appeal, the court of appeals approved the transfer provision on the authority of its decisions in the *Kelley* and *Goss* cases (R. 284; 301 F. 2d at 829).

SUMMARY OF ARGUMENT

This Court held in *Brown* v. *Board of Education*, 349 U.S. 294, 301, that racial desegregation of the public schools must proceed "with all deliberate speed." Compliance with this obligation requires the elimination of segregation as soon as possible. We recognize that school segregation is often merely one part of a deep-seated pattern of racial discrimination which, while contrary to national policy, currently enters into the make-up of many children, both white and colored. Any interim plan for desegregation can properly take account of educational problems. Therefore, while mere hostility to desegregation is not a relevant factor, a district court or school board is not required, given present conditions, to omit suitable provisions for meeting any problems of adjustment affecting the educational development of individual pupils.

The transfer plans in these cases, however, cannot be justified as an essential part of sound school administration. They are not adapted simply to promoting the educational welfare of individual children.

A. The transfer plans were based solely on race and therefore plainly are inconsistent with the Fourteenth Amendment. Negro children living in areas where the

school was formerly all-Negro and presently has a majority of Negroes are not permitted to transfer whereas white children having a residence in the same area can transfer. The only basis for the different treatment is the difference in race.

It is irrelevant that white children in a residential zone where the school was formerly all-white and which presently has a majority of white students cannot transfer whereas Negro students in this same zone can transfer. Superficial equality of treatment was rejected in *Brown* v. *Board of Education,* which held that a separate-but-equal public school system was unconstitutional. Moreover, the right to nondiscriminatory treatment is a personal right; the right of some Negro children to be treated the same as white children in the same circumstances cannot be denied on the ground that other Negro students have rights denied to white students.

B. The transfer plans tend to preserve segregation. They allow any pupil to transfer from a school which formerly served only the other race, or from a school which is presently composed of a majority of the other race. This means that students are free to return to their old racial environment but not to transfer to a new racial environment. Thus, the transfer provisions invite immediate and continuous resegregation solely upon the basis of race. This was the intent of the proponents, and the intent is confirmed by their actual operation.

C. Just as the burden is on the school board to justify delay in according Negro children their constitutional rights (*Brown* v. *Board of Education, supra*), so does a school board have a heavy burden to justify provisions in the desegregation plan which reintroduce racial classifications and appear to support resegregation. At the least, the school board must demonstrate convincingly that the provisions are necessary to meet educational problems.

Here, no such evidence exists. No proof was even offered that the transfer provisions were needed to effect an orderly transition. The only possible legitimate objective they could have had was to alleviate any educational problems individual students might have in adjusting to a school where the overwhelming majority of students were of a different race. But the provisions under review were badly designed to meet this purpose. They would allow students to transfer even when the school was racially balanced, or even when a majority of students were of their own race if the school formerly served a different race.

More important, there are practical alternatives—which are not based on racial criteria and do not support segregation—for meeting any legitimate educational problems in requiring students to attend a school predominantly composed of students of a different race. For example, a school board could allow any student who desired to transfer to

do so, thereby allowing all students the opportunity to attend desegregated schools, instead of merely those living in particular areas. This plan has been followed in large cities with substantial Negro populations, such as Louisville and Baltimore. The school board could also attempt to eliminate the problem of a small minority of students of one race in a school largely composed of another by drawing residential zones in order to introduce a greater balance. Or the school board could apply transfer provisions based on educational and psychological criteria which would apply to children on an individual basis. Such provisions, which are not based on race, have been upheld by the lower courts.

ARGUMENT

We read the plans of the school boards in these cases and also the decrees below as directed to the existing situations in Knoxville and Davidson County—to a period of transition from racially segregated schools to a school system fully complying with the equal protection clause of the Fourteenth Amendment. In each case the district court retained jurisdiction of the action "during the period of transition" (R. 138, 242). The court of appeals specifically noted, with respect to the transfer plan, that (R. 162):

> The trial judge retains jurisdiction during the transition period and the supervision of this phase of the reorganization may be safely left in his hands.

No transfer plan explicitly based upon race is permanently acceptable under a Constitution that prohibits state action in which race or color is the determinant. See *infra*, pp. 22–23. The critical issue in this case, however, as we read the decrees below, is whether the Knoxville and Davidson County transfer plans may be put into effect today, during a period of transition, consistently with this Court's ruling that school districts shall proceed to full integration "with all deliberate speed." *Brown* v. *Board of Education*, 349 U.S. 294, 301.

Compliance with this obligation in a manner that takes into account "the public interest in the elimination of * * * obstacles in a systematic and effective manner" (*id.* at 300) calls for the accommodation of two prime objectives. First, the plan must move ahead towards complete compliance with the Fourteenth Amendment's requirement of "a racially nondiscriminatory school system." *Id.* at 301. Although *Brown* and *Cooper* v. *Aaron*, 358 U.S. 1, involved admission to school and the opinions speak chiefly in those terms, it is too plain for argument that the equal protection clause prohibits the administration of any aspect of public education upon the basis of race, and therefore the elimination of any such discrimination is an essential aim of every decree.

Second, since the welfare of the children is the central purpose of all public school education, any interim plan must take into account their individual intellectual and psychological development affecting education. In many communities school segregation has been merely one part of a deep-seated social pat-

tern, originating in slavery and continuing through racial segregation and discrimination. The evil must be eliminated. The current existence and deep roots of the social pattern are nevertheless temporary facts which have left their effect upon many children, both white and colored. Neither hostility to desegregation nor disapproval of basic constitutional principles is a relevant factor in formulating a plan or determining the speed of transition (*Brown* v. *Board of Education*, 349 U.S. 294, 300; *Cooper* v. *Aaron*, 358 U.S. 1, 7), but, given the present facts, a district court or local school board is not required to omit from its plan of transition suitable provisions for avoiding educational damage to individual pupils as a result of too sudden a forced reversal of rooted habits.[20]

The transfer plans approved by the courts below were ostensibly designed to meet these objectives of wise school administration. See the Statement, *supra*, p. 8. We have no quarrel with that purpose. Given existing conditions, requiring a particular white child who had always lived a sheltered life in a rigidly segregated community suddenly to go to an overwhelmingly Negro school might create problems of adjustment interfering with the individual's educational development. Conversely, forcing a Negro child to break away from his established pattern and attend an all-white school might in some circumstances impair his development. In our view, the constitutional obligation to desegregate the schools "with all deliberate speed" does not require blindly forcing

[20] Under these circumstances, the school board has an initial obligation to prepare students for desegregation so as to lessen the educational and psychological problems.

white children now to attend overwhelmingly Negro schools or Negro children now to attend overwhelmingly white schools at the sacrifice of their individual welfare. School authorities may properly take such problems of individual adjustment into account along with the equally important problem of avoiding psychological or educational damage to Negro children as a result of forcing them to attend all-Negro schools.

Despite its announced objective the transfer plan involved in these cases fails to satisfy the requirements laid down in *Brown* v. *Board of Education, supra*. In our view the plan has three interrelated defects:

1. It introduces into the administration of public education in Knoxville and Davidson County a plan of transfers based solely and explicitly upon race, rather than individual welfare.

2. It tends to preserve the old system of segregated schools by authorizing, upon explicit racial grounds, automatic self-assignment to the school attended under segregation.

3. It ignores the availability of other tested methods of securing the educational welfare of children related to problems of adjustment, which are consistent with the Constitution.

Whatever might be the consequence of any one of these defects standing alone, taken together and in a context of extreme dilatoriness in proceeding to desegregation, they vitiate the Knoxville and Davidson County plans for redressing the violations of petitioners' constitutional rights. In the remainder of this brief we shall discuss these three objections.

A. THE PLAN OF PUPIL TRANSFERS BASED SOLELY UPON RACE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Classifications based on race have been repeatedly held by this Court and by the lower federal courts to violate the equal protection clause of the Fourteenth Amendment. Perhaps the most famous enunciation of the principle was by Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson,* 163 U.S. 537, 554, 559:

> [T]he Constitution of the United States does not * * * permit any public authority to know the race of those entitled to be protected in the enjoyment of * * * [civil] rights.
>
> * * * * *
>
> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. * * * The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

More recently, this Court has stated that racial classifications are "obviously irrelevant and invidious." *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U.S. 192, 203. Nor is the constitutional right to equality limited to any class of situations or category of state action. The Fourteenth Amendment prohibits any "state action in which color (*i.e.,* race) is the determinant * * *. The factor of race is irrelevant from a constitutional viewpoint." *Baldwin* v. *Morgan,* 287 F. 2d 750, 754 (C.A. 5). Consequently, this Court has held unconstitutional a variety of racial classifications involving, for example, juries (*Strauder* v. *West Virginia,* 100 U.S. 303;

Norris v. *Alabama*, 294 U.S. 587), public education (*Brown* v. *Board of Education*, *supra*), parks (*New Orleans City Park Improvement Assoc.* v. *Detiege*, 358 U.S. 54; *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (C.A. 4), affirmed, 350 U. S. 877), and restaurants in publicly owned buildings (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715). The use of race as the criterion for transferring pupils is no less unconstitutional than the use of that distinction in their admission to school.

Both the Knoxville and Davidson County plans make race a sole and explicit criterion for transferring a student from one school to another. Paragraph 6 of the Knoxville plan provides that a transfer will be automatically approved—

> a. When a white student would otherwise be required to attend a school previously serving colored students only;
>
> b. When a colored student would otherwise be required to attend a school serving white students only;
>
> c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race.

No words could make it clearer that the test is one of color.

The superficial equality which the plan accords white and Negro children by enabling each race to leave an integrated school does not save it from invalidity. A similar argument was made in defense of the separate-but-equal public schools existing prior to *Brown* v. *Board of Education*. Under that system white children were required to go to school only with

other white children just as Negro children could only go to school with Negroes. Nevertheless, this Court held that this racial classification violated the rights of Negro children.

Moreover, the right to non-discriminatory treatment is a personal right. See *Brown* v. *Board of Education, supra*; 349 U.S. at 300 ("[a]t stake is a personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis"); *Sweatt* v. *Painter*, 339 U.S. 629, 634; *Sipuel* v. *Board of Regents*, 332 U.S. 631, 633. Thus, in *Shelley* v. *Kraemer*, 334 U.S. 1, it was argued that a restrictive covenant based on race could validly be enforced against Negroes by a state court since the court would also enforce similar covenants against white persons. This Court, however, rejected the contention (*id.* at 22):

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitions to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

The extent to which the transfer plan makes race the criterion is emphasized by the fact that it operates solely in the direction of resegregation. White students may transfer out of any school which formerly served Negroes. Negroes may leave any school which formerly served whites. But no Negro has the same

automatic privilege to leave a school that served Negroes in order to attend integrated classes.

The omission underscores the purely racial character of the differentiation. White students living in a residential zone where the school was formerly all-Negro and is still attended by Negro students have the right to transfer, but Negro students who live in the same area are not allowed to transfer, even though they might equally benefit from the change. Obviously the personal constitutional rights of these Negro students are denied by the racial classification.

The foregoing aspect of these transfer plans emphasizes what is already apparent on their face—that the criterion is not the equal welfare of all children without regard to race; it is race, and race alone. In emphasizing this point we fully recognize that in some communities, during the transitional period, measures for accomplishing desegregation may create individual educational problems, and that it is wise school administration to take such transitional problems of personal adjustment into account even when they originate in customs fixed by race. An interim plan adapted to this purpose, if sincerely aimed at abolishing racial discrimination in the schools, would provide means for not only alleviating problems of individual children who would suffer from difficulty in adjusting to a school where they were numerically overwhelmed by a different race, but also for meeting the problems of Negro children who would otherwise suffer from a segregated education because they happened to live nearest a school in an overwhelmingly Negro part of the community. Such a plan, moreover, would be framed in terms of the welfare of indi-

vidual children and would take some account of circumstances other than race or color. The problems of adjustment of a nervous boy or girl, who has lived in a segregated community, when forced to attend a school where all the other pupils are of a different race, are very different from those of children in a school where the minority is much larger, and still different, no doubt, from those where the proportions are fairly equal.

It may be argued that in the early stages of transition administrative convenience requires a rule of thumb because the difficulties of investigating the situation of each child would be overwhelming. We do not agree that mere administrative convenience is a sufficient justification for making a classification according to race. In other contexts such problems may justify rough working distinctions, but the equal protection clause is more exacting when a State deals with fundamental personal rights. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535. In any event the record contains no evidence to support such a claim; and it is belied by the numerous pupil assignment laws upheld by the lower courts. Those laws which have been sustained make no mention whatsoever of race as a basis for transfer. *E.g.*, *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (N.D. Ala.), affirmed on limited grounds, 358 U.S. 101; *Parham* v. *Dove*, 271 F. 2d 132 (C.A. 8); *Carson* v. *Warlick*, 238 F. 2d 724 (C.A. 4). When race, as such, has been found to be a consideration affecting trans-

fers, the appellate courts have uniformly held the statutes to be applied invalidly. See, *e.g.*, *Norwood* v. *Tucker*, 287 F. 2d 798 (C.A. 8); *Mannings* v. *Board of Public Instruction*, 277 F. 2d 370 (C.A. 5); *Green* v. *School Board of the City of Roanoke, Virginia*, 304 F. 2d 118 (C.A. 4); *Marsh* v. *County School Board of Roanoke, Virginia*, 305 F. 2d 94 (C.A. 4); *Jones* v. *School Board of City of Alexandria*, 278 F. 2d 72 (C.A. 4). Furthermore, other communities have developed entirely workable programs that meet pupils' needs without introducing invidious distinctions based solely upon race. See *infra*, pp. 36–40.

B. THE PLAN UNLAWFULLY TENDS TO PRESERVE SCHOOL SEGREGATION BY AUTHORIZING AUTOMATIC SELF-ASSIGNMENT, UPON EXPLICIT RACIAL GROUNDS, TO THE SCHOOL ATTENDED UNDER SEGREGATION.

A prerequisite of every acceptable plan of school desegregation is that it move definitely and expeditiously away from the old regime of racial discrimination. There is room for dealing with all genuine problems of school administration and pupil welfare. There is no room for nominal compliance followed by racial resegregation even though this be the wish of the local community. In *Brown* v. *Board of Education*, 349 U.S. 294, 300–301, the Court said:

> "* * * the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner.

> The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.

In *Cooper* v. *Aaron*, 358 U.S. 1, 7, the Court elaborated the meaning of the *Brown* decisions:

> Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable com-

pletion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

The school plans involved in these cases are in direct opposition to the Court's directions. Although they provide for substituting pupil assignments based upon zoning in place of racial segregation at the rate of a grade each year, they invite immediate and continuous resegregation solely upon the basis of race. Any white pupil may automatically transfer out of a school that formerly served Negroes, just because he is white. Any Negro may automatically transfer out of a school that formerly served white pupils, just because he is a Negro. These transfer provisions emphasize preservation of past unconstitutional patterns. The test is racial. The reference is to the character of the school under the prior unconstitutional pattern of racial segregation. The transfers operate only to preserve the past. A pupil may transfer out of a new school at which he will find students of both races, presumably to return to his old racial environment, but no one may transfer from his old school to a new racial environment. The transfers

can work only in the direction of segregation. A student who is assigned under the new zoning to an integrated school where most of the pupils happen to be of a different race may transfer out of the area to another school where conditions more nearly approach the old pattern of segregation. On the other hand, a Negro student who is assigned to a school that happens to be all-Negro has no right to transfer to a school attended by pupils of both races.

The extent to which these transfer plans preserve the past unconstitutional pattern is emphasized by the initial steps in their administration. The Knoxville school board adopting a resolution providing for the administration of the transfer provisions as follows (R. 139):

> All first grade pupils should either enroll in the elementary school within their new school zone *or in the school which they would have previously attended.* [Emphasis added.]

In other words, students were not even assigned to schools within the new residential zones and then permitted to apply for transfers if they were eligible to do so under the plan. Rather, they were from the very outset given the option to enroll in the school previously attended, *i.e.*, the segregated school. In Davidson County the school authorities sent notices to the parents of children who, as a result of rezoning, would be required to attend a school different from the one they were then attending. The parents were asked to indicate, within three days, whether they requested permission for the children to stay at the school previously attended (*i.e.*, the segregated school)

or requested permission for a "transfer" to the newly zoned school. Again, this permitted students to remain where they were rather than first being assigned to a newly zoned school and then requesting permission to transfer. Instead of focusing on the future and on arrangements for desegregated schools, these transfer plans look backward to the period when the schools were operated on an unconstitutional basis.

It is clear that the proponents of the transfer provisions anticipated that they will operate so as to preserve segregation. Thus, Dr. Burkhart, president of the Knoxville school board, testified (R. 93–94):

> Q. I am asking you do you or does the board anticipate that any white students will remain in schools which have been previously zoned or used for Negroes exclusively?
>
> A. We doubt that they will.
>
> * * * * *
>
> Q. So then a Negro student who happens to be in a zone where the school for his zone is a school which was formerly used by Negroes only, that school will be continued to be used for Negroes only and he will remain in a segregated school, will he not?
>
> A. Yes, sir.
>
> Q. And if he applied for transfer out of his zone to a school which has been formerly serving white students only, then his application would be denied under this plan, would it not, sir?
>
> A. Unless it were based on one of the other reasons that we have established for transfer. If transferred under one of those, it would be granted.
>
> * * * * *

Q. But a white student to transfer out of a Negro school, as you have stated, would be entitled to do so, to have his application granted as a matter of course under paragraph 6, subparagraph "a" or "c" of the plan?

A. Yes, sir.

Finally, the actual effect of the transfer provisions in this case shows how completely inconsistent they are with this Court's direction that school systems proceed to operate "on a racially nondiscriminatory basis with all deliberate speed." In Knoxville, pursuant to the grade-a-year plan that was approved by the district court, the first grade was desegregated in the fall of 1960. Eighty-five Negroes were eligible to enter previously white schools and 300 white students were eligible to enter previously all-Negro schools.[21] Twenty-nine Negro students actually entered nine of the "white schools", while all of the 300 eligible white students applied for and were granted transfers.[22]

Desegregation in Davidson County presents a similar picture. There, in January 1961, as a result of the rezoning required by the desegregation plan, 288 white children in the first through fourth grades were in zones of the 7 elementary schools that previously were all Negro (R. 194, 252). Taking advantage of the transfer provisions, all 288 students requested and were granted permission to remain in the all-white

[21] See *supra*, p. 11, note 13.

[22] See 1961 Report of the United States Commission on Civil Rights, *Education*, p. 52; Report of the United States Commission on Civil Rights, *Civil Rights U.S.A./Public Schools Southern States 1962*, p. 130. At the beginning of the second year of desegregation, a total of 51 Negroes in the first and second grades elected to attend the "white school" in their residential zone, again in nine schools.

schools that they had previously attended. Similarly, 405 Negro children were in areas that were served by the 62 elementary schools that previously were all white. Only 51 of these students elected to remain in these schools—thus "desegregating" them—while the remainder transferred to the Negro schools they had previously attended (R. 265).

In sum, the transfer provisions of the Knoxville and Davidson County school plans, by permitting automatic transfers back to the old segregated schools avowedly on grounds of race, vitiate the plans as programs of desegregation. For taken as a whole neither plan can fairly be viewed as a bona fide effort to eliminate racial considerations from the school system, temporarily tempered by the realization that previous social patterns may have to be taken into account in promoting the educational and psychological welfare of individual children. Instead, the plan says to the community, "The School Board will do everything possible by transfers to preserve the old pattern of segregated schooling save only in those instances in which geographical zoning enables a Negro to attend, if he wishes, an integrated school." More is required by the obligation to proceed "with all deliberate speed."

In this connection it is relevant to note the grudging and belated compliance in both Knoxville and Davidson County. See the Statement, *supra*, pp. 4–5, note 4. Thus, in the *Goss* case the court of appeals, in disapproving the grade-a-year plan as too slow, said (R. 161–162):

> It has been nearly eight years since the first *Brown* decision and under the plan before us

the first and second grades are now integrated. The evidence does not indicate that the board is confronted with the type of administrative problems contemplated by the Supreme Court in the second *Brown* decision. That the operation of schools on a racially segregated basis is a violation of the Fourteenth Amendment and that the constitutional and statutory requirement of the state of Tennessee prohibiting the mixture of races in schools cannot be enforced are no longer debatable or litigable questions. This has been obvious and evident since May, 1954.

The position of the board that it would continue to operate under these unenforcible laws, until compelled by law to do otherwise, does not commend itself to the Court, for the acceptance of a plan that provides for a minimum degree of desegregation. In the second *Brown* case, the Court said, at p. 300: "The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." In our judgment the defendants have not sustained this burden. We do not think that the twelve-year plan of desegregation adopted at this late date meets either the spirit or specific requirements of the decisions of the Supreme Court.

C. OTHER TESTED METHODS ARE AVAILABLE FOR SECURING THE EDUCATIONAL AND PSYCHOLOGICAL WELFARE OF CHILDREN DURING A PERIOD OF TRANSITION TO FULLY INTEGRATED SCHOOLS

Just as the burden is on a school board to justify delay in according Negro children their constitutional rights (*Brown* v. *Board of Education, supra; Cooper* v. *Aaron, supra*), so does a school board have a heavy

burden to justify provisions in the desegregation plan which reintroduce racial classifications and appear to support resegregation. At the least, the school board must demonstrate convincingly that the provisions will advance desegregation because they are the best way to meet serious educational problems, whether administrative or psychological, which would otherwise cause hardship or delay.

The record in this case does not indicate any educational problem, administrative or psychological, which the transfer provisions are intended to solve. No attempt was made to show that this type of provision is essential to attain an orderly transition to a nonsegregated school system. No proof was offered to demonstrate that whatever beneficial purposes the provision seeks to attain could not be achieved by some other means. So far as appears, the transfer provisions were intended merely to slow the process of desegregation. This objective, of course, is impermissible under this Court's decisions in *Brown* v. *Board of Education*, *supra*, and *Cooper* v. *Aaron*, *supra*.

The only legitimate objective which the transfer provisions could be supposed to advance is to promote the educational welfare of students by authorizing allowance for individual problems of adjustment, affecting a student's educational progress, which might result from requiring a few pupils to go to a school where the overwhelming majority of students are of a different race. The provisions under review, as we have seen (pp. 22–27), were badly designed to meet this purpose. They are phrased in terms of race, not individual welfare. Even in those

terms, which would seem categorically objectionable, one could easily write rules more adapted to the legitimate need. The first two provisions allow students to transfer from the school in their residential zone if the school formerly served only students of a different race, whether or not the majority of students in the school are now of a different race. The last provision allows any student to transfer from a school in which he is a member of a minority race even where 49 percent of the students are of his race. If the transfer provisions were really intended to protect students who are in a small racial minority—the only situation where serious educational or psychological problems seem likely—this could have been done more appropriately by allowing, for example, a student to transfer when only a small percent of the students were of his race. Such a provision, while we believe it invalid in these circumstances, would at least avoid the resegregation of a school which had a close racial balance by the withdrawal of all or most students of the race which was in a slight minority.

Even more important, there are practical alternatives—which are not based on racial criteria and which do not support segregation—for meeting any legitimate educational problems of the children affected.[23]

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[23] At the least, these alternatives appear to be practical and there is no indication in this record that they would not be so either in Knoxville or Davidson County. Since, as we have contended (pp. 34–35), the school boards had the burden of showing that the transfer plans were absolutely necessary to encourage desegregation, we must assume in the present posture of these cases that the alternatives would prove as practical in Knoxville and Davidson County as in the other places they have been tried.

First, the school board might allow any child who so desired to transfer to any school which had available space. This would mean that no child would be required to attend a school overwhelmingly composed of students of another race. On the other hand, all students would have the opportunity to attend schools which were desegregated—not just the few students who happened to be in mixed residential zones. Thus, the open transfer system would make no distinctions in terms of race, give full freedom of choice, and thereby encourage the desegregation of all the schools in the jurisdiction. And the practicability of this plan is demonstrated by its use in numerous big cities with large Negro populations, such as Louisville and Baltimore.[24]

Second, a modification of the open transfer plan is suggested by the opinion of the Court of Appeals for the Fifth Circuit in *Bush v. Orleans Parish School Board*, 308 F. 2d 491. There, the Orleans Parish School Board had requested the right to transfer children according to the provisions of the Louisiana pupil placement law. The court allowed the use

[24] In Louisville, the plan provides for redistricting without regard to race. Parents are advised that they can request transfers to schools outside of the district to which their children are assigned, and they are asked to list three preferences as to schools. Transfers are granted on the basis of available space, convenience for the child, and individual preferences. It is reported that 90 percent of the parents requesting transfers have received their first choice. Wey and Corey, *Action Patterns In School Desegregation*, pp. 97-98. In Baltimore, there are no geographic school districts. A child may transfer from the school he is then attending to any school in the city, with the approval of the principals involved. *Id.* at pp. 99, 148.

of the placement act, but went further than merely ordering the authorities to use it non-discriminatorily. Because of past incidents of total withdrawal of white children from schools which were ordered desegregated, the court gave the Negro children the right to follow migrating white pupils. The order read (*id.* at 502):

> Negro children who attended formerly all-white schools in 1960–61 and 1961–62 and Negro children who have registered for attendance at formerly all-white schools in 1962–63 and subsequent years may not be transferred or assigned to an all-Negro school against their wishes. If the transfer of white students from such schools would result in resegregation, the Negro children shall be afforded an opportunity to attend a nearby formerly all-white school without being subjected to tests for transfer under the Pupil Placement Act."

---

[*] See also *McCoy v. Greensboro City Board of Education*, 179 F. Supp. 745 (M.D. N.C.), reversed, 283 F. 2d 667 (C.A. 4). There the Negro plaintiffs applied for admission to a white school. The school board agreed to admit Negroes to the school but at the same time granted transfers to the white children and teachers. The district court dismissed the complaint on the ground that plaintiffs had been admitted to the school of their choice. The court of appeals reversed and remanded the decision with instructions that the district court retain jurisdiction "so that the Board may reassign the minor plaintiffs to an appropriate school in accordance with their constitutional rights and so that the plaintiffs, if these rights are improperly denied, may apply to the court for further relief in the pending action." 283 F. 2d at 670. The court condemned the board's action on the ground that "although the colored children gained admission to a superior building, their desire to attend an integrated school was completely frustrated." *Id.* at 669.

Third, the desegregation plan of the school board might entirely or substantially eliminate the problem of a small minority of students of one race in a school largely composed of another by drawing the residential zones in a way which achieved a better balance in some or all schools. Any educational problems for the few students of the other race left in the zone of a virtually all-white or all-Negro school could then be solved on an individual basis. Were such measures adopted even the temporary transfer provisions here involved would be comparatively unobjectionable, for this method produces meaningful desegregation of the schools, in full compliance with the Fourteenth Amendment, instead of the merely technical desegregation which results from allowing a few Negroes to attend formerly all-white schools.

Fourth, where two schools exist, one formerly Negro and one white, relatively close to one another, the school board may assign all children, both Negro and white, formerly attending the lower grades in both schools (for example, kindergarten to third grade) to one school and all the children formerly attending the upper grades to another. The result is again to further the process of desegregation and, at the same time, to avoid assigning a small minority of children of one race to a school largely composed of children of another. This method, called the "Princeton Plan", after the city in New Jersey where it was employed, has also been used in numerous other communities in New Jersey and in Benton Harbor, Michigan, Willow Grove, Pennsylvania, and elsewhere. See Greenberg, *Race Relations and American Law*, p. 248.

Fifth, any educational problems, psychological or otherwise, resulting from requiring children of one race to attend a school largely composed of children of another race may be handled by a transfer provision not based on racial criteria. For example, in Dallas, Texas, initial assignments are made to neighborhood schools and transfers are then granted on an individual basis using the criteria of the state pupil placement law, which specifically forbids the consideration of race as a factor warranting transfer. See *Boson* v. *Rippy*, 285 F. 2d 43, 47 (C.A. 5). The validity of such a non-racial transfer provision is demonstrated by the cases upholding pupil placement laws whenever they were administered without relation to race (see *supra*, pp. 26–27).

A community is not only entitled to allow, but should encourage, pupils to transfer when the change will be of educational benefit. We see no reason why the appropriate school authorities should not recognize any bona fide problems of individual adjustment affecting students' educational welfare. But the test must genuinely be not the race but the benefit to the children. Racial segregation cannot be maintained by creating a presumption that requiring children to attend school with children of a different race is always or generally educationally and psychologically harmful. Moreover, such a transfer provision focussed upon the welfare of pupils would allow the transfer of Negro children to desegregated schools on the basis of a showing that this would be to their educational and psychological benefit. Cf. *Brown* v. *Board of Education*, 347 U.S. 483, 494.

We do not advocate any particular plan of desegregation. The plans summarized above are relevant only to show that there are a great many alternative ways of meeting whatever problems may result from requiring a few Negro or white students to attend schools largely attended by children of the other race. There is no evidence, nor even a suggestion, that some such procedure would not be fully practicable in Knoxville and Davidson County. In these circumstances at least, we submit, the transfer provisions explicitly based upon racial criteria and encouraging resegregation are invalid as parts of the present Knoxville and Davidson County plans of desegregation.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgments below should be reversed and the cases remanded to the respective district courts.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1962.

No. 217.

JOSEPH E. COOK et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NASHVILLE, TENNESSEE, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OF THE RESPONDENTS,
County Superintendent of Public Instruction of Davidson County, Tennessee, et al., Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 217.

JOSEPHINE GOSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPONDENTS' BRIEF.

These respondents adopt the statement as contained in the brief for the petitioners as to "Opinions Below," "Jurisdiction," and "Question Presented" (Brief for Petitioners, pp. 1-2).

CONSTITUTIONAL PROVISION INVOLVED.

These respondents respectfully submit that this case involves both Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

These respondents adopt the "Statement" as contained in the brief for the petitioners other than the "Evidence and Holdings" section thereof, with such additional statement as appears herein, said portion of such "Statement" adopted being that portion appearing in the brief of the petitioners, pp. 3-6.

These respondents respectfully submit that the entire plan as submitted by the County Board of Education of Davidson County, Tennessee, should be considered in determining the question presented to the Court. For that reason and for the convenience of the Court, these respondents submit as an additional statement of the case the full text of such plan, to wit:

PLAN

1. Compulsory segregation based on race is established in Grades One through Four of the Davidson County Schools for the second semester of the 1960-61 school year beginning January, 1961, and thereafter for one additional grade beginning with each subsequent school year, i. e., for Grade Five in September, 1961, Grade Six in September, 1962, etc.

2. A plan of school zoning, based upon location of school buildings, transportation facilities and the most recent scholastic census, without reference to race, will be established for the administration of the first grade, and other grades as they are desegregated according to the gradual plan.

3. Students entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may become necessary in particular cases.

4. Application for transfer of first grade students and subsequent grades according to the gradual plan [Col. 47(a)] from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration.

5. The following will be regarded as some of the valid conditions for requesting transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only.

b. When a colored student would otherwise be required to attend a school previously serving white students only.

c. When a student would otherwise be required to attend a school where the interests of students in that school, or in his or her grade, are of a different race.

6. A plan of equal participation by all eligible students in and in formulating nonracial arrangements for the operation of schools in the Fall, such as available space, teaching aids, textbooks, equal participation, zoning, and transportation facilities, will be established.

7. Transportation will be provided to all students that are eligible for this service.

8. As respects the separate classes attended by [illegible] students, there will be no segregation based [illegible], and notice of such will be immediately given

[illegible] June 10 [illegible]

by the School Board to all teachers in the Davidson County school system, both Negro and white, of the availability of these classes.

9. The Davidson County School Board will, prior to the beginning of the Second Semester of the 1960-1961 school year, and prior to the beginning of each school year thereafter, give specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes.

(R. 230-232, 242.)

Evidence and Holdings.

These respondents have no quarrel with the statement of the "Evidence and Holdings" as contained in petitioners' brief, pages 10-11, excepting that statements are made out of context and the statement is not complete. Accordingly, in addition to the statements contained therein, respondents would direct to the attention of this Honorable Court the following:

Under the plan all children are zoned into appropriate school zones. This requires that the child go to the school zone in which he has been zoned, unless an application is made by the parent of the child for permission to transfer to another school zone in which such child is not zoned. The original zoning and the request for permission are equally applicable to all children and their parents, regardless of race (R. pp. 254-255).

Such applications for transfer are not new and novel in a school system, but are historically a part of the school system and have nothing to do with race (R. p. 255). Each application for transfer is considered, both upon the basis of the reason for the transfer and the effect on sound school administration under the terms of the plan

itself (R. p. 231). Out of 405 Negro children, all, except 51, requested transfers to schools where the Negro race was predominant, with better than 12 percent remaining in the school zones to which they were assigned under the zoning plan adopted, without regard to race (R. p. 265). Experience in the area, and especially in the City of Nashville system, had indicated that such voluntary transfers have been in the interest of children of all races, experiencing integrated school attendance for the first time (R. pp. 278-279).

SUMMARY OF ARGUMENT.

1. The transfer provision of the Davidson County Board of Education plan for desegregation affords equal protection to persons of all races; and voluntary segregation is not in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The transfer provisions in the plan were justified in the opinion of the District Judge at the present time, and the matter has been retained on the docket of the District Court so that the transfer provisions could be deleted when or if they become unnecessary or their administration judicially scrutinized, all in keeping with the intent of this Court, as expressed in the case of **Brown v. Board of Education**, 349 U. S. 294.

3. Under Section 5 of the Fourteenth Amendment to the Constitution of the United States it is the duty of the Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation rather than the duty of the Courts to so legislate.

ARGUMENT.

I.

Racial segregation in the public school systems of the United States by **operation of law** is no longer permitted since the decisions of this Court in **Brown v. Board of Education**, 347 U. S. 483 and 349 U. S. 294. Neither these opinions nor any other opinions of this Court require racial integration by operation of law.

The only feature of the plan adopted by the Davidson County Board of Education being challenged before this Court at this time is the provision which permits a child acting through its parent to voluntarily leave a school which is integrated to attend another school. There are many reasons why the parents of either a Negro child or a white child might desire to have that child transferred to another school and such reasons become even more realistic when the child is zoned into a school where it is in the racial minority. Some such considerations on the parts of parents, both Negro and white, would be the desire to avoid a radical departure from custom; or the fear of student friction as a result of rapid departure from the status quo. Deletion of the transfer provision from the plan would have the effect of preventing the school board from giving **consideration** to requests for transfer by a parent who felt that the welfare of his or her child would be promoted by such transfer.

Such consideration by the local school boards is not a system of public education with racial discrimination, but rather is a public education system in which the school authorities retain the primary responsibility for the solution of problems which arise when there is a sudden change over from a system which has been historically segregated

by operation of law to a system which is not segregated by operation of law.

Equal protection is afforded the members of both races, since both races may make application and have consideration given to the same for the same reasons and there is no indication in this record that there has been any deviation from such equal consideration. Accordingly, such a plan is in keeping with the opinion of this Court in **Brown v. Board of Education**, 349 U. S. 294, 299, where this Court stated:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems;"

These respondents feel that the reasoning of Judge McAllister in the case of **Kelley v. Board of Education of City of Nashville, etc.**, 270 F. 2d 209, 228 (6th Cir., 1959), is so clear, cogent and persuasive that we adopt it as Respondents' argument herein and quote the pertinent parts:

> "We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The district court, in the instant case, considered that, in accordance with the reasoning in Briggs v. Elliott,

D. C. S. C., 132 F. Supp. 776, 777, the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. In the Briggs case, it was declared, as we have heretofore mentioned, that the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all it has decided is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. 'This,' said the court, as we have previously quoted, on another aspect of this case, 'under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools. * * *' Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. In Cooper v. Aaron, 358 U. S. 1, 17, 78 S. Ct. 1401, 1409, 3 L. Ed. 2d 5, it was said: 'In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this court in the Brown case, can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."' There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or

a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents.

Nevertheless, as stated in Brown v. Board of Education, D. C., 139 F. Supp. 468, 469, 470, subsequent to the decision of the Supreme Court in the prior Brown case:

> 'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.'

While, in the instant case, the parent makes the choice for the small child, that is the only reasonable method, if such a choice may be made. We see no deprivation of right, under the evidence before us. Doubtlessly, fewer Negro children, or their parents, will avail themselves of the transfer provisions, as grade after grade becomes integrated, and more Negro children attend such desegregated schools as time goes on."

Petitioners rely upon the case of **Boson v. Rippy**, 285 F. 2d 43 (Fifth Cir. 1960). The ultimate result in that case we confess is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the **Kelley** case, *supra*. A careful reading of the **Boson** case, however, and especially the supplemental opinion in the case, would indicate that the United States Court of Appeals for the Fifth Circuit actually deleted the transfer provision from the plan because such would apply a rule of law to the desegregated public schools from the Dallas

School District different from that applicable to other public schools in the State of Texas. That question is not applicable here. On the question of classification according to race, the United States Court of Appeals for the Fifth Circuit said only that:

> "We are so **doubtful** of the validity of the provisions of paragraph 6 that we think they should not be included in the plan."

This doubt seems to have been predicated upon the notation by the three members of the Supreme Court of the United States who thought certiorari should be granted in the **Kelley** case is that the transfer provision constituted "an absolute" ground for transfer of students.

Such a conclusion could result only from a failure to consider the entire plan. Section 4 of the plan as approved by the District Court in both this case and in the **Kelley** case (R., Maxwell 70a), provides only that transfer applications will be **given consideration** when such transfer is practicable and consistent with sound school administration.

Petitioners also rely upon the case of **Dillard v. School Board of City of Charlottesville, Va.**, 308 F. 2d 568 (Fourth Circuit, 1962). In that case it was obvious to the Court that the assignment of pupils and the application of the transfer provision was being administratively applied so as to prevent progress in the desegregation of the schools. In view of that the United States Court of Appeals for the Fourth Circuit to meet such discrimination in the application of the plan held that as respects the sexenteen plaintiffs, elementary Negro pupils, they would be admitted to schools of their choice for the next school year. This opinion was supported by only three of the Circuit Judges and two of the Circuit Judges dissented for the reasons that the plan was fair; the Fourteenth

Amendment did not guarantee the students an integrated school to attend; and any segregation was not the result of the plan but of individual choices of individual students. Respondents respectfully submit that the basis of the dissent is well founded in reason, in equity and in law.

II.

Respondents concede that the local situation in some areas may be such that the transfer provision is unnecessary in the orderly operation of the desegregation plan—either in its transitional period or on a permanent basis. Consideration of the factors making necessary or unnecessary a voluntary transfer provision in each community or region is the duty of the District Court working with the local school board. To fully comply with the duty delegated to the local courts by this Honorable Court, the need for transfer provisions must be considered by the District Courts in approval of plans. In some districts the very reasons which, in the opinion of the District Judge in the instant case, justified such transfer provisions might not be present. If so, then the transfer provision would not be consistent with the opinion of this Court in the **Brown** case, supra.

Further, these respondents freely concede that as desegregated schools become the custom of the community, rather than segregated schools, the need for such transfer provisions as a part of the plan becomes less imperative or desirable. For these and other reasons the judgment of the Court retained this case on the docket of the Court during the period of transition to the end that if time proves the lack of need for such transfer provision, it could be deleted, or if the same was used improperly or to perpetuate or effectuate discrimination, such could be terminated by the Court.

Such is in keeping with the decision of this Court in **Brown v. Board of Education**, 349 U. S. 294, 299, wherein it is stated:

> "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

And it was, we respectfully submit, for just such a purpose that this Court directed in that case that:

> "During this period of transition, the courts will retain jurisdiction of these cases."

III.

The principle of equal protection of the laws is defined in Section 1 to the Fourteenth Amendment of the Constitution of the United States. The definition of how Article 1 applied to the field of public education has been enunciated by this Court.

Section 5 of the Fourteenth Amendment to the Constitution provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Under the separation of powers so clearly set forth in the Constitution, it is the duty of the Congress of the United States, and not of the courts, to enforce the rights of the parties as defined by this Court in its decisions.

Respondents recognize that this is not in keeping with some of the previous statements of this Court and is not in keeping with the method which has been followed in dealing with the several desegregation cases. But it is the method directed by the Constitution and is, it is re-

spectfully submitted, the method which should be followed for the enforcement of the rights of the citizens involved; and until such time as the Legislative Branch of the Government has acted in accordance with the mandate given it in the Constitution to enact such legislation as is necessary to enforce Section 1 of the Fourteenth Amendment, the courts are violating the provisions of that same Constitution and that same section of the Constitution which they allegedly are upholding. Accordingly for this additional reason, respondents respectfully submit that this Court should at this time refuse to interfere with the decision of the District Court.

CONCLUSION.

We therefore respectfully submit that the decision of the United States Circuit Court for the Sixth Circuit in the case of **Henry C. Maxwell, Jr., et al. v. The County Board of Education of Davidson County, Tennessee, et al.**, should be affirmed.

Respectfully submitted.

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In the

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October Term, 1962

No. 217

JOSEPHINE GOSS, ET AL.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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In the

Supreme Court of the United States

October Term, 1962

No. 217

JOSEPHINE GOSS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE

By consent of the petitioners and the respondents endorsed hereon, The Board of Education of Chattanooga, Tennessee, files this brief as *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The *amicus curiae*, Chattanooga Board of Education, has an interest in this case in that said Board has now pending in the Court of Appeals for the Sixth Circuit a petition for review of a decision of the United States District Court for the Eastern District of Tennessee, Southern

Division, *Mapp v. Board of Education of City of Chattanooga, Tennessee*, 203 F. Supp. 843, 853 in which the question involved is the same as that presented for decision in the instant case, that is where the state, acting through a local board of education, extends to parents of certain children in public schools the choice of enrolling their children in either of two schools, such parental choice to be exercised without any restrictions being imposed by the state other than mere transmittal of the decision, once made, to the school board, is such creation of the right of choice by the school board state action that denies equal protection under the Fourteenth Amendment since the result of such choice provision may be that Negroes will choose not to enter certain schools (formerly all-white) and, therefore, such schools may remain segregated, or desegregated to a lesser degree, and further that white parents may make an identical decision so that certain schools (formerly all-Negro) may remain segregated or desegregated to a lesser degree, such result being directly the result, and only the result, of the exercise of individual choice.

SUMMARY OF ARGUMENT

The action of the state in creating a right of transfer for certain pupils and/or their parents who find themselves in certain circumstances during a period while a public school system is in the process of compliance with the constitutional principles originally enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), does not violate the Fourteenth Amendment to the Constitution of the United States as such state action is in no way compulsory under any circumstances, and therefore cannot compel continued racial segregation in

a public school system in any form or degree. Such state action, in and of itself, does not deny equal protection to any individual. The action of the state in creating the transfer classification is grounded upon a reasonable justification, and represents the reasonable exercise of discretion in good faith and in light of all the circumstances by a school board as it progresses toward ultimate compliance with *The Brown Decisions*.

ARGUMENT

The question before the Court is the constitutionality of a transfer provision contained within a plan of desegregation which permits a pupil, who is zoned to a school with a student body composed of a majority of the opposite race, to transfer upon request to another school.

It is the contention of *amicus curiae*, Chattanooga Board of Education, that such transfer provision is not state action of a compulsory nature since it becomes operative solely upon the decision of individual white or Negro parents; therefore, the Fourteenth Amendment is not involved and *Brown v. Board of Education, supra*, is not involved as such was grounded entirely upon the Fourteenth Amendment. Compulsory state action is a necessary factor in order for the provisions of the Fourteenth Amendment to be applicable.

Since 1954 southern school boards have been attempting to discover a means of complying with the constitutional principle enunciated in *The Brown Decisions, supra*, and to maintain, at the same time, the quality of public education in their communities. Numerous lawyers, judges and others have been called upon to interpret *The Brown Decisions, supra*, as they relate to specific factual situations. Widely varying interpretations have resulted in many court decisions including dissenting opinions by respected

jurists. It is necessary to re-examine with meticulous care both the precise language of the Fourteenth Amendment and that of *The Brown Decisions*.

The plaintiffs from Kansas, South Carolina, Delaware, and Virginia based their complaints upon action of the various states resulting in compulsory public school segregation based upon race wherein admission of Negro pupils to certain schools was denied by the state (acting through school boards) solely because of the race of the Negro children. State action was present. Such action was of a compulsory nature. Individual action, discrimination by individuals, was in no way a part of the salient factors under consideration.

As state action was clearly present, the Fourteenth Amendment was applicable. Since the states denied Negro pupil admission to certain schools, the Fourteenth Amendment's specific language was involved. There can be no argument on these two precise points.

These plaintiffs alleged that racially segregated schools were not equal, and could not be made equal and hence that they were being deprived of the equal protection of the laws, again a clear, simple reference to the specific language of the Fourteenth Amendment.

This Court found as a fact that separate schools were not equal, were "inherently unequal", and that compulsory segregation based upon race alone by the action of an arm of the states was unconstitutional as violative of the Fourteenth Amendment.

These decisions were grounded unequivocally upon state action requiring racial segregation in public schools.

In the nationwide debate and conflict that has followed, certain key words have been utilized with repetition such as integration, segregation, resegregation and discrimination. Such words have been used too often in a loose and imprecise manner without the necessary qualifying words,

phrases and clauses. In the minds of many "discrimination" has acquired an automatic inference of unconstitutionality, when, upon reflection, it becomes obvious that the act of discrimination *by individuals* is a part of everyday life and a basic ingredient in individual freedom and liberty. The United States Constitution forbids unequal treatment by the states through laws denying rights. Individuals cannot dignify their individual desires to discriminate, for any reason, by reflecting their desires in the laws of the respective states. Restraints upon individual acts or attitudes of discrimination, whether for good or bad reasons, are beyond the practical power of the state.

In each instance, wherein the word "discrimination" has been introduced into the opinions of this Court, a particular category of discrimination has been described or clearly implied:

> " . . . all state-imposed discrimination against the Negro race. . . ." 347 U.S. 483, 490;
>
> " . . . elimination of racial discrimination in the public school system. . . ." 358 U.S. 1, 7;
>
> " . . . constitutional rights of children not to be discriminated against in school admission. . . ." 358 U.S. 1, 17.

In each instance whenever the word "discrimination" is used, for precise reading the qualification of compulsory state action resulting in discrimination must be added.

Individual discrimination is not prohibited by the Constitution of the United States. In fact, such is protected and defended by the Constitution.

The word "segregation" has been used in an imprecise manner and such use has added to the confusion, misunderstanding and resulting conflict and tension. Some would have this Court believe that segregation of any and all categories is unconstitutional as a result of the inter

pretation of the Fourteenth Amendment in *The Brown Decisions*. The reasoning applied to "discrimination" above is equally applicable to the word "segregation." Many groups, religious and otherwise, voluntarily segregate themselves in at least a portion of their daily living. Such is a part of their freedom and liberty. Such is in no way violative of the Fourteenth Amendment.

Whenever the word "segregation" appears in *The Brown Decision, supra*, or *Aaron* v. *Cooper*, 358 U.S. 1, the facts complained of when the suits were originated must be implied — segregation compelled by state action based upon race alone.

Segregation, per se, is not unconstitutional.

Petitioners complain that the transfer provisions under consideration will result in racially segregated schools. *Amicus curiae*, Chattanooga Board of Education admits such is a reasonable probability, but maintains that such segregation results from decisions of individuals and not from compulsory state action since the transfer provisions are operative only upon individual decisions made without interference by the state in any manner.

There are only four possible factual situations created by such transfer provisions in the Chattanooga public schools, and elsewhere, with reference to enrollment in individual schools:

A. Formerly all-white school wherein the single zone system places a minority of Negroes in the formerly all-white school.

B. Formerly all-Negro school wherein the single zone system places a minority of white children in the formerly all-Negro school.

C. An all-Negro school because no white children live in the school zone, and

D. An all-white school because no Negro children live in the zone.

In situation A. Negro parents did not exercise the right of transfer except for eighteen out of sixty-nine children. As a result, five schools were desegregated. In situation B all white parents requested a transfer so that none of such Negro schools were desegregated. Parents have many reasons for applying for transfers, *one* of which may be race. However, other reasons may be decisive. The granting of transfer requests may decrease the number of schools and classrooms that will be desegregated. Yet this would not have occurred ~~*but for*~~ the exercise of individual judgment by parents. Such continued segregation cannot result from compulsion by the state.

After careful analysis it is clear that the transfer provisions in question cannot function in any manner so as to compel continued segregation in public schools nor to compel a lessening in the degree of desegregation — as a necessary result of state action.

It is true that such transfer provision will create the *opportunity* for continued segregation and lessening of desegregation. But for either or both results to occur, there is the necessary ingredient of the exercise of freedom of choice by both Negro and white parents. Is it unconstitutional for a state to create such an opportunity for individual freedom of choice? Does the Fourteenth Amendment say to each State that it cannot act or refuse to act in any manner that *might* create circumstances wherein individuals *could* act or refuse to act so that segregation somewhere, sometime and in some form is merely *allowed to continue to exist?* Is it now the obligation of the state to move into every situation where any form of segregation may exist and take affirmative action to eliminate segregation? Is this the essence of *The Brown Decisions?*

To adopt this concept is to disregard causation as pointed out by Circuit Judge Miller in his dissenting opinion in *Taylor v. Board of Education of New Rochelle*, 294 F. 2d 36, p. 46

> "The concept of causation pervaded the law long before the adoption of the Fourteenth Amendment or even the United States Constitution. In order to obtain relief from an injury which allegedly results from unconstitutional State action, it is necessary to show both that the State has acted unconstitutionally and that this action caused the injury of which the plaintiff complains."

And even if such causation is present, still another factor must be examined and found to be present before ultimate condemnation of the state action in question.

> "Finally, the opinion must be viewed in the light of the entrenched rule of law that only 'State action of a particular character is . . . prohibited by the Fourteenth Amendment' (e.g., *Civil Rights Cases*, 109 U. S. 3, 11 (1883)); that the 'Amendment erects no shield against merely private conduct, however, discriminatory or wrongful' (*Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)); and that thus if State action did not purposefully create the present racial imbalance at Lincoln, the Constitution would not place an affirmative duty on the Board to desegregate. 'The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration . . .' (*Borders* v. *Rippy*, 5 Cir., 1957, 247 F. 2d 268, 271). 'The Constitution in other words does not require integration. It merely forbids discrimination. . . .' (*Briggs* v. *Elliott*, E.D.S.C., 1955, 132 F. Supp. 776, 777)". *Taylor* v. *Board of Education of New Rochelle*, *supra*, at p. 47.

The transfer provisions in question create two classifications, and these classifications are state created. Are such classifications unreasonable even though they may be technically discriminatory? First should be considered what is the nature of the classification.

A. A public school system in process of shifting from a racially segregated program to one wherein admission to any school is not conditioned upon race alone. That such is a transitional period is obvious from the use of such phrases as "school previously serving white students only . . . ."

B. The transfer right is extended only to pupils and/or parents who are of the minority race in the school to which such pupil is zoned on a geographical basis.

C. With the exception of entering first graders, for such pupils within the classification, this requires a shift from the school formerly attended prior to initiation of desegregation — a radical change in environment, school allegiance, teachers, playmates, etc.

Such classification was created for a purpose and with reasons — reasons believed by many school board members to be reasonable and sound, yes, even essential to peaceful, effective compliance *and* the maintenance of the quality of public education. Excerpts from the dissenting opinion of Circuit Judge Haynsworth in *Dillard* v *The School Board of the City of Charlottesville*, 308 F. 2d 920, p. 928, 929 summarize this reasoning:

> "Those conversant with the problems of desegregation in the South, know the intensity of public concern over the plight of children constituting a small majority *unwillingly assigned to a school in which an overwhelming majority is of the other race.* "If separation of Negro children 'solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,'[4] such a child may be subjected to a much more searing experience if,

[4] *Brown* v *Board of Education*, 347 U S. 483, 495, 74 S Ct. 686, 98 L. Ed 873

bereft of established friends and relations, compelled to attend a school or classes in which all others are of the opposite race. Some children could adjust themselves to such a situation, but in the early stages of desegregation when the force of old customs and practices is unspent, many could not. Those who could not adjust to such a radical change would likely have senses of inferiority greatly intensified, and unadjusted children too frequently become the butt at the hands of their fellows of those unrestrained cruelties of which children of all races are capable. If such unadjusted children are compelled to remain in an intolerable situation, the damage to their emotional and mental development and well-being will be irreparable.

"It is because of such widespread concern over the plight of *unwilling minorities* in particular schools that school boards throughout the South have adopted permissive transfer provisions in association with assignment plans based upon attendance areas or other objective criteria. In some places, such a provision may be essential to the institution or continuance of a plan of desegregation, for it touches an area of peculiar public sensitivity, *and school boards cannot operate public school systems without public support.*

"Provisions for permissive minority transfers are founded upon an assumption that the transition to a fully desegregated school system will create personal problems for unwilling minorities in particular schools, especially when the minority is relatively small, which differ in kind and degree from the problems which majorities, especially relatively large majorities, may be expected to encounter. The assumption seems plainly valid, for it hardly is to be doubted that a child well adjusted in school A where his race predominates, where he has established friendships and where he ardently wishes to be, may become very maladjusted if compelled to attend school B where his own race is a small minority, where he has no

established friends and where racial differences may become greatly magnified in his own mind. Such a problem is obviously more acute and more difficult to overcome than any personal problem which may be anticipated by members of racial majorities, unseparated from established friends, compelled to accommodate themselves to the presence or absence of a minority of pupils of the other race.

"Of course, the magnitude of the personal problems and of the difficulties in the way of requisite adjustments will vary with individuals and with differences in environmental conditions. A child who might encounter insurmountable difficulty, as a member of a small minority, in making the personal adjustment, might encounter little difficulty if the minority group was relatively large, 49%, for instance,[5] and included others who were his old friends. Such variances, however, do not militate against the general validity of the assumption that, in the transitional period, unwilling members of minority groups will encounter difficulties and problems which are different in kind and degree from those which members of majority groups may be expected to encounter.

"This kind of problem exists whatever the race of the minority group. That present provision for permissive minority transfers is in the interest of Negro minorities is suggested by the extent to which they avail themselves of it. This very record discloses that fifty Negro pupils availed themselves of the permissive right to transfer to Jefferson School, rather than attend the predominantly white schools in the attendance areas of which they resided."

To further comprehend the practical results of a rigid geographical zoning without minority transfers, it is necessary for school boards to project their joint thinking to a situation that has not yet occurred in the desegregation

[5] Of course, that is not this case.

process, but will result if the plaintiffs are successful before this Court in striking down minority transfers. What can a board do if a white child or a Negro child refuses to attend a school where such child is in a minority? A board in Tennessee can invoke the compulsory attendance law and turn the matter over to the state courts. Contempt measures would be available. But what if the parent does not purge himself of the contempt charge? How would a contempt ruling be enforced against a child? Would an officer of the Court escort such child to school each day against his or her will and then remain on duty to make certain that the child was restrained in the classroom? Practical considerations involved in enforcement of judicial actions must be considered carefully.

There can be no argument about the absence of compulsory state action in the transfer provisions before the Court. As a factual matter such action does not and cannot exist. Therefore, if compulsory state action is essential to the applicability of the Fourteenth Amendment, then such amendment is irrelevant to the question before the Court. The only way to involve the Fourteenth Amendment is to hold as a matter of constitutional interpretation that such amendment does cover such state action that does not compel. Such a decision forces the states and the courts into vast areas of speculation, probability and confusion — not only with regard to racial discrimination in the public schools, but across all human endeavor and activity.

Amicus curiae contends that the Fourteenth Amendment is applicable only if state action is required and the compulsory nature of such action is disregarded. Causation must be dismissed as irrelevant. Such an interpretation would appear to be unsupported by either logic or reason.

Should these two objections be met, the classifications created by state action must be found as a fact to be unreasonable.

Amicus curiae, Chattanooga Board of Education respectfully requests approval of the transfer provisions in question because:

A. the state action involved, considered alone, does not cause nor compel continued public school racial segregation, does not deny equal protection, and therefore does not violate the Fourteenth Amendment.

B. such state action in any event is a classification based upon reasonable grounds and is therefore not violative of the Fourteenth Amendment.

C. even if such state action is objectionable, it is a reasonable exercise of discretion by a school board, consistent with the second *Brown Decision* during a transition period as such represents reasonable progress toward ultimate compliance.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments of the Court below should be affirmed.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

By written consent of the parties in the cause, the Board of Education of the Memphis City Schools files this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The amicus curiae, Board of Education of the Memphis City Schools, has an interest in

this case in that the Memphis school system is operated under a plan of desegregation on file with the United States District Court for the Western District of Tennessee. This plan is attached hereto as Appendix A. Under the plan unitary non-racial school zone lines have been established and every student, regardless of race, is assigned to the school serving the zone of his residence. The Plan then contains the following provision:

> "The pupil assignment law and Board of Education policies and regulations will govern pupil assignments and transfer applications but the following factors will be regarded as some of the valid conditions that may be considered to support applications for transfer:
>
> A. When a white student would otherwise be required to attend a school previously serving colored students only.
>
> B. When a colored student would otherwise be required to attend a school previously serving white students only.
>
> C. When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race."

This provision was first approved by the Sixth Circuit in **Kelly v. Nashville** (1959) 270 F. (2d) 209, cert. den., 361 U. S. 924, and has been included in the Plans of Desegregation of every major school system in Tennessee. The operation of the Memphis school system's plan of desegregation is similar in many respects to the plans involved in the two cases in which the Court has granted certiorari. Therefore, the decision in this case will materially affect the implementation of the Plan of Desegregation of the Memphis City Schools.

SUMMARY OF ARGUMENT

I.

The Fourteenth Amendment protects the freedom of the individual and prohibits a State from depriving the individual of life, liberty or property without due process of law; or from denying to the individual the equal protection of the law.

Under plans of desegregation in Tennessee, Boards of Education have established unitary non-racial school zone lines and students are assigned to the school serving their zone without regard to race or color. After making a non-racial school zone assignment, the school

systems' plans of desegregation recognize the rights of parents of students in a racial minority to apply for a transfer out of the school to which the student has been assigned. The enrollment of the school to which transfer is sought may be a bi-racial one, or one attended by members of another race, or one attended by members of the race of the pupil seeking the transfer.

Boards of Education **may**, and we emphasize the term may, either grant the transfer application or reject it. This determination shall be based upon the parents' wish, existing school facilities and other educational factors not related to race.

For reasons which will be more fully explained in the Argument, we respectfully suggest that the granting of a right to a parent to petition for a transfer on the ground that his child is in a racial minority is not state action which is condemned by the Fourteenth Amendment.

II.

If this Court should determine that it is a violation of the Fourteenth Amendment for school boards to expressly permit parents to voice this desire to transfer their children for

racial reasons, then we respectfully request that the Court under its equitable powers recognized in the second Brown decision, 349 U. S., 294, approve this provision in plans of desegregation during the transition to a racially non-discriminatory school system.

ARGUMENT

I. The Fourteenth Amendment Condemns State Action.

The Fourteenth Amendment to the Constitution is directed not at individual action but only at action of a state through one of its agencies such as a board of education. In **Cooper v. Aaron,** 358 U. S. 1, 3 L. Ed. (2d) 5, 78 S. Ct. 401, this Court stated:

> "The controlling legal principles are plain. **The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws.** 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person with-

in its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Pennsylvania v. Board of Directors of City Trusts of Phila. 353 U. S. 230, 1 L. Ed. 2d 792, 77 S. Ct. 806; Shelley v. Kraemer, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441, or whatever the guise in which it is taken, see Derrington v. Plummer (CA5 Tex.) 240 F. 2d 922; Department of Conservation & Development v. Tate (CA4 Va.) 231 F. 2d 615."

The recognition in Cooper of the rule that the Fourteenth Amendment is directed only at action of the state is a reaffirmation of the law enunciated in earlier decisions of this

Court. For example, in the Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835, it was said:

> "The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that
>
> > 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> **It is state action of a particular character that is prohibited.** Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this,

but, in order that the national will, thus declared, may not be a mere **brutum fulmen**, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation, To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carry-

ing such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the Amendment may be found in U. S. v. Cruikshank, 92 U. S., 542 (XXIII, 588); Va. v. Rives, 100 U. S. 313 (XXV, 667), and Ex Parte Va., 100 U. S., 339 (XXV, 676)

. . . . . .

And so in the present case, until some state law has been passed or some state action through its officers or agent has been taken, adverse to the rights of citizens sought to be protected by the 14th Amendment, no legislation of the United States under said Amendment, nor any proceeding under such legislation, can be called into activity; for the prohibition of the Amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the Amendment was intended to provide against; and that is, state laws, or state actions of some kind, adverse to the rights of the citizen secured by the Amend-

ment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State Legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property, which include all civil rights that men have, are, by the Amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the Amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the

> Amendment, they are prohibited from commiting or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character."
> 109 U. S. at Page 11.

We see then that before the Court should condemn a part of a plan of desegregation on the ground that it contravenes the Fourteenth Amendment, it must be determined that the state has compelled certain action. The Fourteenth Amendment does not condemn the free and voluntary action of an individual. If an individual, having been extended the opportunity to attend a desegregated school and, in fact, having been assigned to that school by the state, exercises his own choice not to attend that desegregated school, such action is action of the individual, not the state. The relation of the Fourteenth Amendment to individual action is well stated in **U. S. v. Harris**, 106 U. S. 629, 27 L. Ed. 290, where it was held:

> "The purpose and effect of the two sections of the 14th Amendment above quoted were clearly defined by Mr. Justice Bradley in the case of U. S. v. Cruikshank, 1 Woods, 316, as follows:

'It is a guaranty of protection against the acts of the State Government itself. It is a guaranty against the exertion of arbitrary and tyrannical power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require nor authorize Congress to perform.' The duty that the guaranty itself supposes it to be the duty of the State to perform and which it requires the State to perform."

. . . . . .

"So in Virginia v. Rives, 100 U. S., 313 (XXV, 667) it was declared by this court speaking through Mr. Justice Strong, that

'These provisions of the 14th Amendment have reference to state action exclusively and not to any action of private individuals.'

These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the 14th Amendment.

The language of the Amendment does not leave this subject in doubt. When the State

has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its department has deprived any person of life, liberty or property, without due process of law, nor denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the Amendment imposes no duty and confers no power upon Congress."
106 U. S. at P. 638.

The position of this amicus curiae may be stated thusly:

The Fourteenth Amendment would seem to compel school boards to consider within lawful limits the wish of a parent as to the school which his child should attend. The Fourteenth Amendment was adopted to protect the freedom of every individual and that freedom should include the freedom of a parent to express a preference that his child attend a school with a majority of the members of his own race. So long as the

state does not compel attendance at a segregated school and has extended to a student the right to attend a desegregated school the state should be entitled to receive and, where possible, to act upon the expressed desire of a parent. This Court should support this freedom to the same extent and for the same reasons that it condemns state action compelling a student to attend a segregated school.

2. Not State Action But Personal Freedom.

The case at bar points out graphically the operation of that phase of the plan of desegregation which petitioners seek to have declared unconstitutional. This record shows that in establishing unitary non-racial school zone lines in Davidson County, 405 Negro children were in zones of the 62 elementary schools that had previously been attended by white students. (R. 194, 252). The briefs of petitioners and the Solicitor General point out that the parents of 51 children, or twelve (12%) per cent of the 405 Negro children involved, exercised their right to attend a desegregated school. It results, therefore, that the parents of 354 Negro children expressed a preference that their children attend a school with members of their own race. This prefer-

ence was the free choice of the parents, unfettered by state compulsion.

The desires of the parents of those 354 children presents directly the question which this Court must answer. How should boards of education in Tennessee treat the expressions of the parents of these children? What should happen to these 354 children? Shall they be compelled to attend school with members of another race? Shall the Davidson County Board of Education be compelled to make these 354 children, or even one of these children, attend a desegregated school when neither the parents nor the child desire that? Have we now reached the point where the state must compel the integration of these pupils?

A recent study entitled "The Drop-Outs" by Lichter, Rapien, Seibert and Sklansky (McMillan Co., 1962) points out the tremendous problem with which boards of education are confronted in trying to persuade students to complete their education. This publication shows that as many as 70% of the youth in the 16 to 20 age bracket in certain large urban areas will be neither attending school nor employed. At page 59 of this report it is stated that the drop-out rate among Negro students

is higher than among other students. If those Negro children are compelled to attend a desegregated school, what is the drop-out rate going to be? Are they going to complete their high school education and go on to become useful citizens of the United States, their state and their community, or will they end their education at the sixth or seventh grade?

Is there constitutional prohibition against giving the parents of the child the right to say: "I don't want my child to attend a biracial school. I am proud of my race and I prefer that the school board, if it is possible, assign my child to a school attended by a majority of the members of my own race"? Is a state guilty of violating the Fourteenth Amendment when it permits its citizens to express a preference as to the school which their children shall attend and accedes to that request consistent with available facilities and other factors related solely to education?

3. Petitioners Seek Compulsory Integration.

A. Perspective.

Frequently, in cases such as this, a Court is asked to render a decision in a vacuum. By this statement we mean that if this case follows the general pattern, neither the Goss

child, the named plaintiff in the suit, nor any of the remaining plaintiffs are pressing for a determination of the constitutional invalidity sought by petitioners. Instead, a serious and important constitutional issue is presented to the Court by the National Association for the Advancement of Colored People. This issue involves the substantial rights, not only of boards of education, but even more important, the rights of parents who desire the privilege of expressing to their board of education an objection to compelling their children to attend a desegregated school in which their race is in the minority. It is the Association's position that boards of education should be forbidden to act upon the expression of the parents' will.

We do not intend that these remarks should be construed as criticism of the Association. It has every right to attack unconstitutional action of school boards or any branch of state and local government. By the same token, boards of education have the right to defend the operation of the school system so that every student may receive the best possible education unhampered by social pressures. Because of the scope of the Association's activities and the success with which its efforts have been met it is often easy to accept the

basic principle which the Association espouses while losing sight of the effect which that principle might have on people and, in fact, the very people whose cause the Association so fervently and capably advocates.

To at least partially fill this vacuum and put this case in perspective, we feel that the Court should be apprised of the background of this litigation and what we consider to be the motivating factor for petitioners' objection to this provision in a plan of desegregation.

It is a matter of common knowledge as demonstrated by the preferences expressed by Negro parents in Davidson County that the National Association for the Advancement of Colored People has experienced considerable difficulty in its efforts to persuade a considerable majority of Negro citizens to enroll their children in desegregated schools. The reasons for this difficulty are vague and obscure. We are confident that the Association attributes this apathy to fear of reprisal but the very fact that 255,367 Negro students attended bi-racial schools would indicate that fear is of little significance.

On the other hand there are those who say that this desire not to attend a school in which

members of one's race or religion or national origin are in the minority flows from normal human characteristics and desires. The fact that racial reasons, rather than reasons based upon other considertions, create in an individual the desire for the right to petition a board of education not to assign the child to a desegregated school should be of no consequence so long as the State does nothing to compel the parent to act but only listens to the parents' petition and entertains that petition where possible.

At this juncture it would be pertinent to reply to the Solicitor General's implied criticism of the slow pace at which desegregation is proceeding. He rests this implication on certain statistics showing that "255,367 of the 3,279,431 Negroes of school age living in the southern and border states", or 7.8 per cent, have come to attend bi-racial schools. This comparison is completely meaningless. Almost uniformly in Tennessee and throughout the United States, a child's eligibility to attend a particular school is governed by that child's place of residence as related to his school zone. Members of a particular race or national origin tend to settle in well defined neighborhoods and schools have been built to serve those neighborhoods. Because of this

fact the overwhelming majority of Negro students live in a school zone serving only members of their own race.

Though no accurate statistics are available, this Court knows from its own observation of conditions in every large urban area that considerably less than 1 person in 4 live in a racially mixed neighborhood. It would be safe to assume, therefore, that of the 3,279,431 Negro students in southern and border states, less than 1,000,000 of them would normally be assigned to a desegregated school. It results that more than 25 per cent of those children who are eligible are now attending desegregated schools. Considering customs that have existed for literally centuries, this is a remarkable result that has been achieved since this Court's decision in the Second Brown Case, 349 U. S. 294, a period of less than eight years.

The Solicitor General states at page 3 of his Brief " . . . To some, this represents great progress in bringing about changes in deep-rooted social patterns; to others, the pace has been too slow . . . " Regardless of one's attitude, the fact remains that boards of education have no control over neighborhood racial patterns. All that school boards can do is draft unitary non-racial school zone lines and

assign children to schools upon the basis of those lines without regard to the race of the student.

The pace at which Tennessee has desegregated its public schools, under desegregation plans containing the provision which petitioners attack, may be found in the United States Civil Rights Commission report styled "Civil Rights U.S.A., Public Schools Southern States 1962" at page 107-132.

B. Practical Operation

Let us assume that petitioners are successful in this litigation. Let us assume that the Court decides that a provision in a plan of desegregation permitting a parent to make a successful application for transfer because his child is in a racial minority is that type of state action which contravenes the Fourteenth Amendment. The first and obvious result of this decision will be that boards of education are denied the right to consider the parents' wishes if those wishes are based upon the race of their children. But what is the effect of such a decision?

Though an answer to this question might be furnished by reference to the 405 Negro students in Davidson County, we respectfully

suggest that the experience in Nashville, Tennessee, is much better and more impartially documented, and with the Court's permission we would like to refer to the practical operation of that system's plan of desegregation. A further reason for referring to the experience in Nashville is the fact that it was one of the first communities in the United States to formulate a plan of desegregation and its plan, including the minority transfer provision, has been a guidepost from both a practical and legal standpoint, i. e., all of the school systems presently before the Court have adopted the Nashville plan almost verbatim. Kelly v. Nashville, (1959, 6 Cir.), 270 F. 2d 209.

The operation of the Nashville Plan is discussed at length in Civil Rights U. S. A., Southern Schools, 1962, page 115, et seq. Under this plan each student is assigned to a school upon the basis of unitary non-racial school zone lines. In the event a Negro student is assigned to a desegregated school, he must attend that school, unless his parents make written request to transfer to a school attended by members of his own race.

After three years of operation of the Nashville plan 87 per cent of the Negro students sought transfers out of desegregated

schools and in the fourth year, i.e., 1961-1962 it was estimated that only 20 percent would remain in desegregated schools; thus, 80 per cent of the students would seek transfers out of those schools. The reasons assigned by the parents for those transfers are many and varied but only the most naive would attribute reasons other than race to the great majority of these applications. How then shall boards of education in Tennessee handle these transfer applications?

Petitioners, apparently recognizing the incongruity of their position in this cause, suggest that we become a blind Solomon and grant these transfers, or perhaps only a few of them, "based on individual hardships and other educationally acceptable standards unrelated to preservation of the segregation system." (Petitioners' Brief, page 21, 22). In other words, ignore the truth, and fictionalize a ground for transfer other than race.

While petitioners furnish us with rather broad standards to disguise the same objective, i.e., to accede to a parent's request that his child attend a school in which his members are in a racial majority, the Solicitor General furnishes us with five specific standards which he artfully describes as "'Tested Methods". (Brief, page 37, et seq.)

It is remarkable that petitioners and the Solicitor General not only recognize the problem but go even further and furnish a variety of solutions. The only difficulty is that the solutions which they furnish are totally lacking in candor. Who but a parent can determine the intimate effect of this characteristic which we term "race"? Would it not be challenged as unconstitutional if a board of education say that a child's race constitutes "... an individual hardship (or) other educationally accepted standard unrelated to the segregation system" as petitioners suggest?

The solutions suggested by the Solicitor General range from abandonment of the educational theory of neighborhood schools, to "Gerrymandering", to more patent subterfuge. In support of this statement we refer to the fifth "Tested Method" which states that "any educational problems, psychological or otherwise, resulting from requiring children of one race to attend a school largely composed of children of another race may be handled by a transfer provision not based on racial criteria". It is difficult to see what criteria other than race a board of education could assign to support its action since the educational problem results from race because the child is required to attend a school

largely composed of children of another race.

With all due deference to these suggestions we respectfully submit that more, not less, candor should be expected from school authorities. The Civil Rights Commission has characterized the conduct of this Memphis Board of Education in the desegregation field by using the term "good faith". To be less than candid might well be expedient but it would be out of character and detrimental to the relation which this board has attempted to establish with some degree of success with members of both races.

Let us proceed now to a consideration of the Board's position in this difficult situation. It receives a transfer application from one of the 405 Davidson County parents and it grants that application. The parent is satisfied and the child is satisfied. Their constitutional right to attend a desegregated school has been accorded to them and rejected.

But, unfortunately, the case does not end there. The National Association for the Advancement of Colored People learns of the transfer. The Association learns that the board has acceded to the wishes of one of its patrons and transferred his child because the child had been assigned to a school where a

predominant majority is white. The board is called before the Court to explain its action and in all candor the board says "Yes, we granted that transfer for racial reasons". Thus, the Association argues that the board has operated its school system on the basis of race. Of course the Board could say "Oh, no, we granted that transfer along the lines suggested by the Solicitor General", but that simply would not be true.

Since the transfer application was approved, at the parent's request, on the basis of race, the board is subject to being cited for contempt for violating its injunction. This contempt might be purged by returning the child to a desegregated school and there the child remains — compelled to integrate — compelled by the state to attend an integrated school against his wishes and against the wishes of his parents. His constitutional rights in this sense of the word were forced upon him — not by the parent or by the child, but by the Association. Is that the meaning or the tenor of the Fourteenth Amendment? Can the Fourteenth Amendment be construed to compel a Negro child to attend a school that he does not want to attend? To attend a school that cannot educate him best? We respectfully suggest that to apply the Fourteenth Amend-

ment to gain this result does violence to Constitutional principles.

It is the position of this Board of Education that this Court should condemn compulsory integration with the same clarity and firmness that it has heretofore condemned state-imposed compulsory segregation. The compulsion of integration by the state is as obnoxious and invidious as the state's compulsion of segregation.

The rationale of petitioners' position is that the state should compel a child to attend a desegregated school if that child resides in a desegregated school zone. If this action by the state does not speed the desegregation process at a rate which petitioners feel is satisfactory, then we must assume that petitioner will next urge that boards of education should be compelled to adopt the Princeton Plan (See Solicitor General's Brief, Page 39), or some other experimental program, so that each child may have the opportunity to attend an integrated situation. Petitioners overlook the fact that school boards are primarily concerned with affording a child the best educational opportunity and sociological experimentation, though important, is a secondary consideration.

Petitioners' objective must be attributed to a desire to improve educational opportunities for all students served by the public school system. If we test this method by reasonable educational standards, we find it sadly lacking. Perhaps the outstanding authority on education in the United States is Dr. James Bryant Conant, former president of Harvard University. In his book "Slums and Suburbs, A Commentary on Schools in Metropolitan Areas" (McGraw-Hill, 1961) Dr. Conant discusses the problem which this Court and boards of education now face. We have attached to this Brief as Appendix B excerpts from Dr. Conant's book.

4. Use of the Transfer Provision During the Period of Transition.

Having recognized the skill and ability of petitioners' counsel, we must also recognize the possibility that the Court will be persuaded that it is unconstitutional for a board of education to accede to a parent's request to transfer his child when that request has as its basis the parent's desire to avoid integration, this integration having resulted from state action in making non-racial school assignments.

Recognizing that this possibility exists, we respectfully ask that the Court approve such

provision as a part of a school board's plan of desegregation pending full compliance with this Court's decision in **Brown v. Board of Education,** supra.

We have heretofore stated the use which will be made of this aspect of the plan and we trust that we have demonstrated the necessity for it. It is not a tool that will be used by boards of education to frustrate desegregation. On the contrary it is another aid to permit a school system to effect the transition without imposing undue hardship on parents or children.

CONCLUSION

These United States are populated by two predominant races — the Negro and the white. Justice Harlan has quite appropriately said in Plessy v. Ferguson, 163 U. S. 537, that the Constitution which governs these races is "... color blind, and neither knows nor tolerates classes among citizens". He said also that

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such

rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals under the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper ...”

Neither the Constitution, nor this Honorable Court, nor boards of education can repeal the law of nature which created and perpetuates these two races. It is a fact which exists in the minds of human beings. The Constitution directs that the state, acting through the Board of Education, must make an initial non-discriminatory assignment of students attending public schools. But, as Justice Harlan has said, the Constitution deprives no man of his pride of race and under appropriate circumstances, when the rights of others, his equals under the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.

Shall the Court now say that this is an empty privilege — that the Fourteenth Amendment compels the State to ignore that individual's expression? We trust not.

Respectfully submitted,

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APPENDIX A

Plan of Desegregation of The Board of Education of the Memphis City Schools (Filed August 29, 1962)

I. The following procedures shall govern the operation of the school system for the school year commencing September 1, 1962:

A. A plan of school zoning or districting based upon the location of school buildings with a single geographical boundary line for each school based on the latest scholastic census will be immediately established for admission to grades 1, 2 and 3.

B. All students new to the school system in grades 1 through 3 may register in the school of their choice, even though such registration may be in a school other than that within the geographical boundaries referred to above. Assignments will then be made by the Board of Education on the basis of the geographical boundaries described in Section A. However, if the school chosen by the students new to

the system in grades 1 to 3 is not within the school zone of the residence of the student but said school has sufficient facilities for caring for the students so enrolled, the Board of Education may at its option assign such students to the school chosen by the students. Any parents dissatisfied with assignments made by the Board of Education may make application for transfer. Such applications shall be processed under the pupil assignment law.

C. All Negro pupils who elected to attend desegregated schools last year may remain in the desegregated schools which they have previously attended.

D. The transfer applications made by second and third grade Negro pupils in the current school year to attend open schools heretofore attended predominantly by white students shall be approved.

E. The assignment of all other pupils in the school system made in June, 1962, for the school year 1962-63, together with such transfers as the Board of

Education has approved, including those applications described in Paragraph D. above, will be allowed to stand. At the end of the school year commencing September, 1962, assignments of pupils in grades 1 through 4 for the school year commencing September, 1963, will be made in accordance with single geographical school zone lines established for each school.

II. For the school year beginning September 1, 1963, Grades 1, 2, 3 and 4 of all elementary schools in the Memphis Public School System shall be desegregated by the establishment of single school zone lines for said grades in each elementary school. Each year thereafter an additional grade in all schools shall be desegregated. As successive grades are desegregated, non-racial school zone lines will apply to all grades which are desegregated.

III. A plan of school zoning or districting based upon location of school buildings and the latest scholastic census will be established for the admission and assignment of students in grades 1, 2, 3 and 4 effective before the end of the school

year beginning September, 1962. As successive grades are desegregated such non-racial zone lines shall be created or extended for the successive grades. Said single school attendance areas shall be on a geographic basis according to the capacity and facilities of the buildings and other factors important to the efficient operation of a public school system. Each pupil residing within the zone shall be assigned to and shall have the right to attend the school within his zone so that attendance areas based on race shall be eliminated. The Board of Education retains the right to modify or change such school zone lines in order to make economical use of its facilities.

IV. For the school year commencing September, 1963, each student entering grades 1 through 4 and the remaining grades in successive years will be permitted to attend the school designated for the zone in which that student resides, subject to regulations that may be necessary in particular instances. Such regulations will be based upon factors such as pupil-teacher ratio, classroom availability, and other factors not related to the race of the pupils.

V. The Pupil Assignment Law and Board of Education policies and regulations will govern pupil assignments and transfer applications but the following factors will be regarded as some of the valid conditions that may be considered to support applications for transfer:

A. When a white student would otherwise be required to attend a school previously serving colored students only.

B. When a colored student would otherwise be required to attend a school previously serving white students only.

C. When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race.

VI. In instances of patent need for a particular course of study, the Board of Education may entertain applications for transfer under the Pupil Assignment Law for students in grades other than those grades which are desegregated under this plan of desegregation to the end that no

student will be denied the right to obtain the best education which that pupil is capable of attaining. The Board of Education reserves the right to accelerate this Plan of Desegregation at such time as circumstances and conditions permit.

APPENDIX B

Excerpts From "Slums And Suburbs",

A Commentary On Schools And Metropolitan Areas,

Dr. James Bryant Conant
(Page 27, et seq.)

"In concluding this chapter, I should like to turn to a thorny subject of great concern to those interested in improving Negro education. This is the question of whether or not de facto segregation, as some like to call it, is detrimental to the education of the Negro. Closely related is a second question; namely, should the school authorities endeavor to move Negro children into purely white schools in order to have as many mixed schools as possible? The issue is a very real one, and in a sense it is primarily political. At this point I must make reference to the Supreme Court decisions of 1954 and 1955 because of a tendency to regard them not only as the law of the land but as a sacred text on education. Clearly even a unanimous opinion of the Supreme Court fails to determine educational policy except within the framework set by the issues before the Court — in this case, the "segregation of children in public schools solely on the basis of race." It is necessary to point

out this obvious fact, for I have heard the statement made that because the Supreme Court expressed the opinion that "Separate educational facilities are inherently unequal," all completely Negro schools are morally wrong and that there is essentially no difference between de jure segregation still found in almost all Southern communities (1961) and what some call de facto segregation in portions of the large Northern cities. The point is important and deserves discussion.

If one turns to the Supreme Court decision in the case of Brown et al. v. Board of Education of Topeka (347 U. S. 483 (1954), one finds the sentence I have just quoted about separate educational facilities. Taken out of context, the conclusion might be drawn that the justices declared separate educational facilities for whatever reason provided are morally wrong and if supported by tax funds are illegal. Yet on reading carefully the whole opinion, I think the key sentence is the question defined by the Court: "Does segregation of children in public schools **solely** on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." I have emphasized the word

"solely", as I presume to think it is the essential word. The justices appear to have expressed no view as to whether the pupils in a completely Negro school are deprived of equal educational opportunity if they are not assigned solely because of their race. In short, if one group of children is separated from another group because of the neighborhood in which they live, the fact of this separation is, of and by itself, no evidence of an inequality in education. Whether in fact the facilities and instruction are equal in a 100 per cent white school, a mixed school, and a 100 per cent Negro school in a large city is to be determined by examining the schools, not by appeal to phrases such as de facto segregation with the implication that it is to be condemned by all right-thinking people who condemn de jure segregation.

In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school

through the expenditure of more money for needed staff and facilities. Moreover, I believe that any sense of inferiority among the pupils caused by the absence of white children can be largely if not wholly eliminated in two ways: first, in all cities there will be at least some schools that are in fact mixed because of the nature of the neighborhood they serve; second, throughout the city there ought to be an integrated staff of white and Negro teachers and administrators.

To insist that such solutions cannot be acceptable and to assume instead that the schooling of Negroes can be satisfactory only if in each schoolroom there are present some white children is to take an extremely defeatist view of Negro education in the large cities. The proposal to move any appreciable number of white children by bus into what are now Negro schools or to move all the Negro children in a Negro neighborhood into what are now white schools presents a transportation problem that is quite insoluble. An examination of the geography of the Negro and white sections of the large cities makes this evident. If some children are to be transported, the question arises which children and how many. I am not discussing here what seems to me to be a separate question; namely, the crossing

of school attendance lines when waves of population movement create overcrowded conditions in one attendance area and vacancies in another. Nor am I justifying the gerrymandering of attendance lines; such a procedure amounts to separating pupils **solely** on the basis of race.

At the elementary school level the issue seems clear. To send young children day after day to distant schools by bus seems out of the question. It must be remembered that unless by the accident of population migration there are empty seats in the predominantly white schools, white children would have to be transported to negro areas in order to free the necessary space. Clearly a complicated arrangement for moving large groups of young children around a city for the sake of mixing all the elementary schools is hardly worth discussing. At the high school level, the youth are certainly old enough to commute; one complication present in the elementary schools has disappeared. Still, a great network of transportation would have to be provided in a number of cities if the goal were to have every high school a mixed school. I have already noted the problem of determining the proper degree of admixture of white and Negro children . . . .

Much as I admire the comprehensive high school in the town with one high school and see it as an instrument of democracy, it seems impossible for school authorities in a large city to create artificially a series of such schools. If a policy were to be adopted that, as an ideal, every neighborhood school should have a widely heterogeneous school population represented by all socio-economic backgrounds, school administrators would be forced to move children about as though they were pawns on a chessboard.

If good schools can exist only with a heterogeneous student population, one could argue just as logically that state authorities should adjust all school district lines so that the high-income surburban high school would include students from a neighboring depressed area. Another impossible proposal. Antithetical to our free society as I believe de jure segregation to be, I think it would be far better for those who are agitating for the deliberate mixing of children to accept de facto segregated schools as a consequence of a present housing situation and to work for the improvement of slum schools whether Negro or white. The problems in these schools are far more difficult to solve than in other schools, larger and better staffs should be available, more money

is required. It is my firm belief that actions based on the premises I have outlined are in the best interests of the Negro and of the nation." . . . .

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 217.

JOSEPHINE GOSS, et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

BRIEF

Of the Respondent Board of Education of the City of Knoxville, Tennessee, and the Individual Respondents in the Knoxville Case.

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

Local school boards are authorized to take into account transitional problems of ~~public~~ stemming from race.

The transfer plan in this case, as interpreted and upheld by the Court of Appeals, reflects the assumption that in Knoxville an application for transfer based upon race is actually based upon the existence of an educational detriment or hardship due to race. The record tends to support this assumption.

Respondents believe it to be their duty, even if the challenged transfer provisions are disapproved, to grant transfers supported by good cause even though due to racial considerations.

ARGUMENT.

We are in agreement with the United States as *amicus curiae*, in whose brief it is stated:

> ". . . we fully recognize that in some communities, during the transitional period, measures for accomplishing desegregation may create individual educational problems, and that it is wise school administration to take such transitional problems of personal adjustment into account even when they originate in customs fixed by race."

(Brief for the United States as *amicus curiae*, 25.)

The petitioners agree (Petitioners' Brief, 21-2).

Respondents also agree as stated in Brief for the United States at page 18 that the provisions of Paragraph 6 of the Knoxville desegregation plan which specify race as sufficient ground for transfer are under review here only as transition measures. As such they may be entitled to approval where not so entitled if under review as permanent rules, just as, for instance, the postponement of desegration in grades not yet reached in an approved step plan is valid.

Both the Honorable Robert L. Taylor, Judge of the Federal District Court at Knoxville, and the Knoxville School Board learned early that welfare of Negroes as well as whites could be seriously jeopardized by imposing the **Brown** decisions too speedily upon the community. The Clinton disorders (R. 48), occurring in a community only eighteen miles from Knoxville, which resulted from a direction by Judge Taylor[1] to desegregate the high schools of Anderson County, Tennessee, were referred to in his

[1] *McSwain v. Co. Bd. of Ed. of Anderson Co.*, 138 F. Supp. 370 (E. D. Tenn. 1956).

opinion as revealing "pockets of hate and lawlessness" (R. 123) and giving him grave concern (R. 136). The wisdom and experience of the local authority should not be overriden in the name of equal treatment, when the feared result will be a worsened experience for both races, not only disruptive of education but creating and hardening racial animosity and destroying racial tolerance, understanding and mutual trust now undisturbed in Knoxville for fifty years.

In Knoxville only in rare instances will white parents permit their children to go to predominantly Negro schools, and the majority of Negro parents won't let their children go to predominantly white schools. Judicial commands don't change these attitudes. Forced compliance by either Negro or white would be normally regarded as harmful to the child. Overly rigorous enforcement of the **Brown** decision by the courts very likely will do more damage than under-enforcement by school boards.

Proof will undoubtedly show that through the years the Knoxville Board as a matter of course has granted transfers upon far less substantial grounds than the least of the frictions stemming from race.

When the plan of desegregation was under study in the District courtroom the main controversy was whether the grade-a-year feature was justified. The transfer provisions were merely incidental; they were valid under the holding that the **Kelley** case[2] and the challenge to them received scant attention. The proof, however, which supports a gradual desegregation also tends to support the transfer provisions. Moreover, the very fact that an application for transfer is made upon the ground of race, is some indication that actual prejudice to the pupil will follow if

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[2] *Kelley v. Bd. of Ed. of the City of Nashville*, 270 F. 2d 209 (6th Cir. 1959).

the transfer is denied. The application for transfer is tantamount to expression of the parents' opinion that the child will be at a disadvantage if not transferred and, through experience, the Board is inclined to agree. In this state of the record the Court of Appeals in effect held that inasmuch as the transfer provisions could be properly applied, they were valid but the Board was admonished not to use them as a means to perpetuate segregation (R. 162). We interpret this to prohibit transfers upon a naked ground of race. The result was to uphold the transfer provisions with leave to the plaintiffs to show specific instances of abuse, mis-use or misapplication of the provisions by the Board. The transfer plan simply reminds the transfer officers that there is an assumption that requests for transfers based upon race are supported by actual good cause which stems from race. Respondents submit that the validity of this assumption is sustained by the common knowledge that practically every departure from the segregation that has heretofore always existed in schools in communities such as Knoxville will embarrass, harm, or otherwise handicap somebody.

If, however, this Honorable Court in the absence of more specific proof in support of these provisions, should disapprove them, this action should not be a bar to a subsequent application by respondents to revive these provisions if proof then offered shows that they should be revived as a transition measure. During such period as they may be inoperative, and indeed as a permanent policy, the respondent Knoxville Board of Education feels that it will not be its duty to blind itself to such actual educational prejudice as may occur, whether to white or Negro pupils, due to inability to adjust or to be accepted by fellow pupils or other handicap. In such cases, the Board of Education will grant application for transfers where it is reasonable to expect that the applicants thereby will be helped in obtaining an education, and the Board

will do so even though the pupils' handicap is attributable to his race. This is but part of respondents' objective of providing as good an education for each child of Knoxville as they can. So far, they have preserved undisturbed classrooms and have worked out a genuine acceptance of children of both races in the same classrooms of the first four grades.

At this time the Knoxville School Board is of the opinion that it will be practicable, although it will make their duties more difficult, to delete from its plan Paragraph 6, which is the one here attacked, and utilize Paragraph 5 of this plan, which broadly authorizes transfer for "good cause" (R. 31-2) to govern all cases, including those of handicap due to race. This will compel separate investigation of each application for transfer, necessitating employment of additional personnel and expense, but can be done in this community. Whether this is practicable in other southern cities with proportionately greater Negro population is questionable. If not required of them, it should not be required of Knoxville. The retention of Paragraph 6 will greatly ease the administrative job.

For the foregoing reasons, we respectfully submit that the transfer provisions of the Knoxville plan of desegregation of the public schools should be approved and the judgment below affirmed.

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IN THE

Supreme Court of the United States

October Term, 1962

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Petitioners,

—v.—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent City of Knoxville urges that the racial transfer provisions "are under review here only as transition measures" (Knoxville Br. 3). Referring to "disorders . . . occurring in a community only eighteen miles from Knoxville . . . " it argues that "In Knoxville only in rare instances will white parents permit their children to go to predominantly Negro schools, and the majority of Negro parents won't let their children go to predominantly white schools" (Knoxville Br. 4). Knoxville argues also that "there is an assumption," which it calls valid, "that requests for transfer based upon race are supported by actual good cause which stems from race" (*Id.* at 5). But the Board concedes it could make transfer following individual evaluations under Paragraph 5 of its plan, which covers "all cases, including those of handicap due to race" (*Id.* at 6). While

Knoxville concedes such individuation is possible in the case now before the Court, the city urges that other communities may not be able to manage it; therefore, Knoxville also should be able to use race as a gross factor in justifying transfers (*Id.* at 6).

Respondent Davidson County Board of Education principally makes the argument[1] that "the Fourteenth Amendment did not guarantee the students an integrated school to attend; and any segregation was not the result of the plan but of individual choices of individual students" (Davidson County Br. 11-12). *Amicus curiae* Chattanooga and Memphis School Boards make the same argument (Chattanooga Br. 3, *et seq.*; Memphis Br. 5, *et seq.*).

The Racial Transfer Features Are of Indefinite Duration.

In reply, petitioners submit first that the racial transfer provision is not casually incidental to the desegregation plan, but is as permanent as any other feature of school administration in the respondent communities. Moreover, the option is an unconstitutional racial discrimination and perpetuates the segregated system.

There is no evidence whatsoever in the record that either racial transfer provision is temporary or designed to operate only during a period of transition—although if this were true their invalidity would be nonetheless obvious. Notably, no party or *amicus* (including the United States which condemns the transfer provision but views it as temporary) (United States' Br. 18) cites anywhere to the record to demonstrate that the option is temporary. Of course, all equity decrees under continuing jurisdiction may be called temporary in the sense that they may be modified; but modifications must be related to unforeseen

[1] This Respondent here relied on the dissent in *Dillard v. School Board of the City of Charlottesville*, 308 F. 2d 920 (4th Cir. 1962).

changes in conditions. *United States* v. *Swift & Co.*, 286 U. S. 106. All policies and practices of school boards are subject to change. Perhaps the transfer provision was assumed to be transitional because it was coupled to a twelve-year desegregation plan. But under this view coalescence of the Negro and white zones (R. 52, 214) might also be called temporary. And other features, obviously of a permanent nature, also might be termed transitional, e.g., paragraphs 5 of the Knoxville and 4 of the Davidson County plans (transfers may be allowed for "good cause") (R. 52-53, 214), 6 of Davidson County plan (pupil registration to be held in the spring) and 7 of Davidson (transportation to be furnished to eligible students) (R. 215). None of these, however, may be assumed to terminate at any time in the foreseeable future, and on their face are permanent. There is no reason to assume that the racial transfer features are limited in a way that these are not.

Indeed, the racial feature should be read in the light of Respondents' proven desire to accomplish no more desegregation than compelled to. Knoxville's Answer asserts that so far as *Brown* v. *Board of Education*, 347 U. S. 483; 349 U. S. 294, is concerned "The decisions of that [this] Court are never unchangeable, and a different membership in the future may order differently . . . [although] there does not now exist reasonable support for the proposition" that this will occur "within the foreseeable future" (R. 27). Knoxville has asserted a desire to perpetuate segregation "indefinitely" (R. 79-80) and features of its plan which retain segregation should be read in that light. Davidson County similarly made no effort to fulfill

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[2] The Knoxville supervisor of child personnel testified that the racial transfer provisions would merely add an additional ground for transfer to the system theretofore employed for 23 years (R. 117); he nowhere suggested that this addition was temporary.

its constitutional duty to desegregate until specifically compelled by judicial decree.

It is more reasonable to assume on these records that these respondents would like to retain as much segregation as they can for as long as they can, and the plans, therefore, do not permit bare assumptions that their racial features will disappear at some indeterminate time in the future. On this record, the inescapable conclusion is that after the grade-a-year features of the plan have been exhausted, the transfer provisions will remain on the books unless expressly repealed or invalidated by judicial decree.

The Racial Option Plans Are Unconstitutional State Action Whether Temporary or Not.

The racial option is based on an "assumption" (Knoxville Br. 5) "that requests for transfers based upon race are supported by actual good cause which stems from race" (*Ibid.*). Knoxville refers to "common knowledge" that embarrassment, harm and handicap flow from desegregation. The Davidson County brief (p. 7) refers to a desire to transfer "to avoid a radical departure from custom; or the fear of student friction. . . ." Both of these plans, in actual application, allow "paper" transfers, that is, pupils simply choose their schools on the basis of race before going to any school (R. 141, 219-226). Therefore, neither plan requires transfers on the basis of the experience of individual children but, *a priori*, each allows an option as to whether one desires to be desegregated or not.

This is, of course, contrary to the principal assertion of respondents' briefs, state action in a number of senses. (1) It is a complex of private and state conduct in the nature of such a combination condemned in *N. A. A. C. P. v. Alabama*, 357 U. S. 449. (2) Moreover, by rule of the

State, a Negro child is denied the right to transfer in a situation wherein a white child explicitly has that right and vice versa. This seems to fly in the face of the most elementary reading of *Brown* v. *Board of Education*, 347 U. S. 483. If children may not be assigned on the basis of race, why should they be permitted to transfer on this basis?

But beyond this, and far more invidious, is (3) the fact that the plans so structure the school systems as to perpetuate segregation for as long as possible (R. 104, 108, 226, 277). Thus, this Court's admonition that school districts are to act as promptly as possible to convert from *systems* of segregation to "*systems*" (*Brown* v. *Board of Education*, 347 U. S. 483, 494; 349 U. S. 294, 300; *Cooper* v. *Aaron*, 358 U. S. 115), of nonsegregation is thwarted by a standard of system-wide application designed to perpetuate segregation to the greatest degree possible while affording token compliance stretched out over a long period of time.

Petitioners certainly do not contend that if an individual child has proven difficulties in a particular educational situation, the school officials may not do whatever is necessary to alleviate his personal difficulties. But petitioners submit that seldom, if ever, should such a child be permitted transfer on a racial basis. Certainly at the very least all other reasonable avenues of approach to the problem should be exhausted before, even in an individual case, school authorities may consider race.

Racial distinctions between citizens "are by their very nature odious to a free people", *Hirabayashi* v. *United States*, 320 U. S. 81, 100, and are constitutionally suspect, *Korematsu* v. *United States*, 323 U. S. 214, 216; cf. *Bolling* v. *Sharpe*, 347 U. S. 497. One of the principal impediments

to effectuating the decision of this Court in *Brown* v. *Board of Education*, *supra*, has been that resistance has taken the form not so much of outright defiance as of perpetuation of segregation under forms nominally unrelated to race.

Indeed, Knoxville argues in substance, and in advance of investigation of particular cases, that if it were permitted to transfer children on an individual basis because of objections to racial desegregation, the end result would be essentially what it seeks to accomplish under the racial option transfer provision (Knoxville Br. 6). This is a particularly dangerous prospect for law enforcement when, as in Knoxville, "The Board's serious, frank deliberations on the subject of desegregation were not in the formal open meetings" (R. 59).

Therefore, while no rule of law can entirely guard against decisions which express unstated privately arrived at considerations, any rule which encourages or even allows considerations of race greatly expands the opportunity to maintain segregation under other labels. The deliberate speed formula allowed time for the solution of specified administrative problems and other problems in like categories. It explicitly excluded hostility to desegregation as ground for delay, but because of its generality it could not prevent its being used as it was in Knoxville and Davidson County as a basis for doing nothing until a court order were entered against the defendants. To the extent that the deliberate speed concept, as one resting essentially on administrative considerations, were to be loosened to allow for "transitional problems of personal adjustment . . . even when they originate in customs fixed by race" (Brief for United States as *Amicus Curiae* 25; Knoxville Br. 3) it will offer additional ammunition to those forces in communities which want to do nothing, even though there also exist in those communities forces which desire

to comply with the Constitution. To the extent that the compliance formula is tightened to eliminate any express racial consideration, it will strengthen the hand of those who desire to do their constitutional duty.

Respectfully submitted,

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